90-1855

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT PRICE, and all others similarly situated, DELORIS BLANCO, RONALD RAFFO, ET AL.,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether non-union employees in an industry governed by the National Labor Relations Act ("NLRA"), state a valid cause of action under the First Amendment to the United States Constitution by their complaint that the union acting under color of § 9(a) of the NLRA requires them, pursuant to a compulsory unionism clause enforced under color of § 8(a)(3) of the NLRA, to finance union activities without first establishing and implementing procedural safeguards for First Amendment rights.

2. Whether violations of the union's duty of fair representation under the NLRA are established by the union's failure to provide non-union employees with the same procedural safeguards required by the First Amendment for public sector employees and by § 2, Eleventh of the Railway Labor Act for private sector employees (*Ellis v. Railway Clerks)*, where the union:

A. deliberately refuses to disclose the expenditures of local union affiliates for which fees are exacted, under an unsupported, unilaterally adopted and implemented "presumption" that local union affiliates spend more on chargeable activity than the international union itself;

B. provides no independent auditor's verification of chargeable expenditures; and

C. offers only nonconsensual "arbitration" as the means for resolving employee disputes over proper exactions.

LIST OF PARTIES

PETITIONERS:

Robert J. Price, Deloris Blanco, Donald Raffo, James Q. Ryley, Charles P. Crandall, III, James T. Kearney, Samuel W. Holdridge, Douglas A. Gilleo, Ellen W. Morris, Gustave P. Brucker, III, Gilbert E. Dionne, Robert L. Martin, Robert M. Maloney, Arthur P. Vine, Ronald E. Plebiscito, Robert J. Martin, Theresa R. Weiss, Linda R. McCoy, Jeanne W. Lamperelli, Anthony J. Pupillo, Thomas J. Gomes, Clyde W. Phelps, Marilyn M. Flaherty, Thelma B. Olsen, Nancy Parvin, Richard R. Caffary, Clement R. Pitts, Kenneth Ferria, Barbara D. Simmons, Donald L. Brown, Ben J. Edwards, Jr., Joan R. Boiselle, Ernest L. Le Beau, Beresford B. Cooper, Thomas L. Theroux, Francis X. Walters, Louisa Beverly Lopes, Kenneth H. Jodry, Peter N. Turco, Harold G. Joseph, Thomas Schneider, Maurice M. Beebe, Jr., Donald R. Reuss, Jr., Laurie Brown, Mildred A. Gula, George A Enos, Jr., Claude D. Carlson, Gerald N. Chenail, Thomas F. Edwards, Jr., Martine A. Flory, Christine A. Lopez, Mary Deborah Marshall, Arline M. Brown, Joan M. Jones, Eric Hinz, Paul G. Way, Rudolph D. Burdick, John P. Ward, Gerard J. Morrone, Michael Maglio, Warren Lewis, Eileen Pupillo, David C. Kingsborough, Alycia F. Limson, Frank B. Thackeray, Gale E. Franklin, Bruce H. Burnham, Melvin T. Reagan, Delmar G. Cherry, Lawrence J. Mellow, Christopher M. Vananzio, Michele M. Williams, Rose E. Walsh, Walter L. Wooten, Cynthia L. Slack, Sally R. Perkins, Grant J. Bombria, Michael F. Cipriano, Herbert O. Sturman, Claude P. Hoffman, Beverly A. DeGaetano, John J. Salveggio, Robert C. Olsen, Albert A. Ferris, Janice M. Williams, Esther T. Pepin, Walter E. Harrington, David C. Kingsborough, David Duffy, Patricia A. Rossi, John A. Skinner, Nancy E. Stumpo, Walter Ignatowich, John S. Hammett, Patricia A. Wright, Harold Chappell, Robert J. Urban, Donald A. Ciccone, Kevin Thomas Bentley, Paul G. Way, Russel V. Barth, Paul Whitehead, Lawrence J. Morth, Roger F. Harrington, John Soda, Gary J. Vargas, Raymond J. Caviggia, Phillip E. Rathbun, William M. Fiske, Judith A. Lamperelli, Christopher J. Peters, Richard J. Perras, William Synan, Harry W. Wheeler, Donald G. Maxson,

Jr., Sandra L. Way, Charles J. Howard, Jr., Kenneth W. Drennen, Helenia M. Ilvento, Francis L. Gumbert.

RESPONDENTS:

International Union, United Automobile Aerospace And Agricultural Implement Workers of America; Marine Draftsmen Association, Local 571, UAW, AFL-CIO. Electric Boat Division, General Dynamics Corporation, was also a party to the proceedings below.

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No. 90-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT PRICE, all others similarly situated, DELORIS BLANCO, RONALD RAFFO, JAMES Q. RYLEY, CHARLES P. CRANDALL, III, ET AL.

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO and ELECTRIC BOAT DIVISION, GENERAL DYNAMICS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Robert Price, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit are reported at 927 F.2d 88 (2d Cir. 1991) and are reproduced in the appendix at pages 1a and

13a, respectively.[1] The rulings of the United States District Court for the District of Connecticut are reported at 722 F. Supp. 933 (D. Conn. 1989), 136 L.R.R.M. (BNA) 2641 (D. Conn. 1990), and 136 L.R.R.M. (BNA) 2701 (D. Conn. 1990). These opinions are reprinted in the appendix at pages 15a, 29a, and 34a.

The prior decisions of the court of appeals and the district court are reported at 795 F.2d 1128 (2d Cir. 1986) and 621 F. Supp. 1243 (D. Conn. 1985). The Order of this Court previously granting a writ of certiorari and vacating the judgment of the court of appeals in this matter is reported as *Price v. International Union, UAW*, 487 U.S. 1229 (1988).

JURISDICTION

The present judgment of the court of appeals was entered on March 4, 1991. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh are involved in this case.

29 U.S.C. § 158(a)(3), provides in pertinent part:

(a) *Unfair labor practices by employer*

> It shall be an unfair labor practice for an employer– (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor or-

[1] "_a" references are to the accompanying Appendix hereto.

> ganization...to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later....
>
> 45 U.S.C. § 152, Eleventh, provides in pertinent part:
>
> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirement of this chapter shall be permitted--
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class:....

STATEMENT OF THE CASE

A. Procedural Setting of the Case

This case presents a question of nationwide significance: whether non-union employees covered by the National Labor Relations Act ("NLRA") are entitled to procedural protections in the exaction of agency fees that are substantively the same as those that this Court has held are required under the Railway Labor Act ("RLA"), where this Court has held § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA are materially identical.

In 1988, this Court granted the petitioners' writ of certiorari after resolving the conflict between the Second and Fourth Circuits in *Communications Workers of America v. Beck*, 487 U.S. 735, 741 (1988). *See Price v. International Union, UAW*, 487 U.S. 1229 (1988). The Second Circuit had concluded that Section 2,

Eleventh of the RLA was distinguishable from Section 8(a)(3) of the NLRA for purposes of agency fee collection procedures, and specifically disagreed "with the [Fourth Circuit] *Beck* majority's analysis of this issue." *Price*, 795 F.2d 1132.

In *Beck*, 487 U.S. at 745-46, this Court specifically held that Section 2, Eleventh and Section 8(a)(3) "are in all material respects identical. Indeed, we have previously described the two provisions as 'statutory equivalent[s],' *Ellis v. Railway Clerks*, 466 U.S. 435 n, 452 n.13 (1984)'...In these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes." Thus, in *Beck*, this Court overruled *Price* on this issue and granted *certiorari* vacating *Price* and remanding for proceedings consistent with that action.[2]

Despite this Court's remand, the Second Circuit chose utterly to ignore this instruction and with but one passing reference to the Court's holding in *Beck*, App. 4a, determined that the whole matter of fee collection rules under the NLRA "was unchanged [s]ince the Supreme Court in *Beck* expressly declined to rule on the state action issue, that decision does not in any way modify this Court's prior determination that the union shop agreement is 'a product of private negotiations and [is] not attributable to the government.'" App. 6a. Thus, the court of appeals' instant opinion was rendered just as though *Beck* had not been decided and the court's own prior *Price* decision had not been vacated.

The Auto Workers' identical agency fee policy was rejected by the Sixth Circuit in *Cramer v. Matish*, Nos 89-1885, 89-2077 (6th Cir. 1990), reprinted herein at App. 47a, and the result in *Cramer* was specifically rejected by the court below. App. 11a. The Second Circuit, then, creates a second judicial standard by disagreeing with *Cramer* and permitting the exaction of dues

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[2] "The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Communications Workers of America v. Beck*, 487 U.S. [735] (1988)." 487 U.S. 1229 (1988).

under the union agency fee plan without requiring judicially mandated accounting and remedial proceedings. Thus, there is a marked conflict between the circuits on this issue.

B. Factual Background

1. Petitioners Robert Price, *et al.*, filed the complaint here on November 15, 1984, in the United States District Court for the District of Connecticut. The current 119 petitioners work for General Dynamics Corporation, Electric Boat Division ("employer"), in a unit of technical and clerical employees at the employer's shipyard in Groton, Connecticut. They are non-union employees represented for collective-bargaining purposes by respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Marine Draftsmen Association Local 571, UAW, AFL-CIO ("union").

Federal court jurisdiction over the complaint is alleged under 28 U.S.C. §§ 1331, 1337, and 29 U.S.C. § 185 for injunctive relief, declaratory judgment and damages (C.J.A. 11).[3] In particular, Count IV of the petitioners' Amended Complaint alleges that the union breached the preconditions for exactions set out in 29 U.S.C. § 158(a)(3) and owed a:

> duty to represent fairly all employees who are within the unit. The duty of fair representation does not permit Defendant Unions to demand, obtain, and spend Plaintiffs' initiation fees and/or dues for purposes outlined in paragraph 8 because such demand and expenditures is in excess of Plaintiffs' true financial obligations under 29 U.S.C. Section 158(a)(3) incorporated by implication in Article III of the collective bargaining agreement.

C.J.A. 16-17.

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[3]"C.J.A." references are to the Corrected Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

2. Since August 24, 1984, the respondent unions and the employer have entered into a series of collective bargaining agreements containing "union shop" clauses. The language of the clauses has never been amended and has always required maintenance of membership in the union and the payment of initiation fees and membership dues as prescribed in the unions' by-laws and constitution. Facially, but not actually, collection was limited to the extent permitted by "applicable State and Federal law." C.J.A. 76.[4]

3. When the first "union shop" clause was executed, petitioners requested that the union provide them with information establishing the pro-rata share of collective bargaining/contract administration costs which they should pay to comply. The union responded that the full amount of initiation fees and or dues was required within ten days or it would seek petitioners' discharge. *Price*, 795 F.2d at 1130; App. 37a.

4. After the Court's decision of June 29, 1988, in *Communications Workers of America v. Beck* and the remand to the Second Circuit in light of it, plaintiffs filed a Motion for Entry of Injunction in the court of appeals to enjoin further collection of "dues" until the unions provided proper disclosure and emplaced a court approved agency fee plan. The court of appeals referred the matter to the district court. In response, the defendant unions adopted a new agency-fee payer policy, which was first announced to the petitioners by letter to counsel dated October 21, 1988. App. 29a-33a.

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[4] "Section 1. Any employee on the Employer's active payroll who is in the bargaining unit on September 30, 1986, and employees hired, recalled, or transferred into the bargaining unit subsequent to this date shall be required, as a condition of employment, by the thirty-first day of employment, recall, or transfer, to join (unless already a member) and maintain membership in the Marine Draftsmen's Union." Union Security Provision of the employer-respondents' September 30, 1986-August 25, 1990 collective bargaining agreement. C.J.A. 76.

The new policy purports to apply a litigation exception to the plaintiffs only, in providing a limited rebate of 14.4% to plaintiffs for the period since July 1, 1988 to October 21, 1988, and placing into a union-controlled "escrow" account the remaining 85.6% pre-plan amount until verification of the expenditures through a union-selected American Arbitration Association arbitrator. Plaintiffs were informed that they could challenge the UAW's yearly fiscal audit report limited to "the calculations in the Report or any challenge claiming that the Report does not properly determine what portion of UAW's expenditures were expended on matters unrelated to collective bargaining." App. 31a.

Furthermore, the unions chose to adopt a so-called "local presumption" that the percentage of expenditures on non-bargaining unit related activities of the International Union, UAW, is greater than that of respondent Marine Draftsman Association, Local 571. Based upon that unilateral determination, the unions provided no data to petitioners concerning the expenditures of the local union, even though the record reveals at least 35% (and up to 65%) of agency fees collected by Local 571 from the petitioners are retained by Local 571. C.J.A. 79; R-72, Section 2.[5]

5. In the Motion for Entry of Injunction, petitioners alleged that since June 1, 1988, agency fees had been "arbitrarily set by Defendant Unions in excess of Plaintiffs' pro rata share," and they demanded an accounting of union finances to establish expenses incurred for the unions' collective bargaining, grievance representation and contract administration duties. C.J.A. 7-8. They also requested a 100% escrow of dues until proof of their proportionate share of bargaining unit related expenses was provided to them, in advance of collection, by the unions. C.J.A. 9.

6. Petitioners also challenged the unions' use of non-consensual AAA arbitration, the taking of full dues prior to

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[5] "R-" references are to the district court record.

judicial approval of the UAW's agency fee plan, the continued exaction of dues prior to the ascertainment of an approved percentage of union bargaining expenses by the court, and the use of the unions' local presumption. R-74. They showed that the unilaterally imposed AAA arbitration is not fair, as the rules were jointly developed by the AFL-CIO and by counsel for the UAW, arbitration could be invoked only by the union (which took two years to invoke the arbitration), that the selection of AAA arbitrators had been pre-screened by AAA agreement with unions opposing employees' *Beck* claims and the individual employees have no role in selecting the pool of arbitrators or the particular "arbitrator" to decide their case. C.J.A. 66.

C. The District Court's Opinions

On defendants' motion to dismiss or for summary judgment, the district court dismissed the first three Counts of the Amended Complaint that alleged a violation of free speech rights under the First Amendment, a prior restraint under the First Amendment for demanding full dues payment, without an accounting, under threat of discharge, and deprivation of property without due process of law. C.J.A. 15-16. It determined that section 8(a)(3)'s authorization of the "union shop" created no "state action" for purposes of federal constitutional analysis because in its notion this Court's vacation of *Price* was on "purely statutory grounds." App. 30a.[6]

The district court resolved the § 8(a)(3) question by applying the same analysis employed by the vacated *Price* opinion because the "'state action' reasoning of the Second Circuit opinion was not altered or disturbed." App. 20a. Therefore, "rather than reiterate that analysis, that part of the Second Circuit's opinion which discusses the lack of state action, 795 F.2d at 1132-33, is incorporated herein." App. 20a. Because the district court

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[6] The district court did determine that *Beck* should be applied retroactively and granted petitioners summary judgment on that point. App. 37a. The fees collected pre-*Beck* are not now in issue.

adopted the state action analysis of the Second Circuit, it held that the remaining standard upon which to review the unions' rebate plan was one of arbitrariness under the duty of fair representation rather than one of equivalent statutory construction between the RLA and the NLRA.

D. The Court of Appeals' Decision

The Second Circuit determined that there were "no constitutional concerns which warrant the safeguards found necessary in *Hudson*." App. 8a. It also chose to readopt by "adher[ing] to" its prior opinion and again believed that the express preemption of "contrary state law" is "the critical distinction" between the RLA and NLRA union shops. *See* 795 F.2d at 1128 and 6a.

This distinction allowed the Second Circuit to find that the unions' actions vis-a-vis the petitioners meet the general standard of fair representation set out in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Agency fee collection review now employed post-*Beck* by the Second Circuit is strictly limited: "it is necessary only that the procedures employed not be arbitrary, discriminatory, or implemented in bad faith." App. 8a.

The court below rejected the petitioners' argument that the standard under § 8(a)(3) set by this Court in *Beck* is that the duty of fair representation mandates that the union provide the same protections for nonmembers as are required under § 2, Eleventh of the RLA. That court also determined that petitioners' reliance on the Sixth Circuit's contrary decision in *Cramer v. Matish* regarding the respondent International Union, UAW, was "misplaced," thereby endorsing the application of two standards of review for one agency fee payor policy. The court also ignored the fact that *Beck* establishes that excessive exactions are a *per se* violation of § 8(a)(3), something a § 9(a) exclusive representative is not permitted to do, and that no proof beyond the exactions is necessary for nonmembers to show "arbitrary, discriminatory, or bad faith" conduct.

Thus, the Second Circuit now has twice relied upon a perceived distinction in "state action" between § 8(a)(3) and § 2, Eleventh to apply different standards of fair representation under those sections, contrary to the holding of *Beck*, 487 U.S. at 747, that "Congress intended the same language to have the same meaning in both statutes."

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S REFUSAL TO APPLY THIS COURT'S CLEAR INSTRUCTION IN *BECK* THAT UNDER THE NLRA, STANDARDS OF FAIRNESS, LEGISLATIVE INTENT, AND CONCERN FOR FIRST AMENDMENT RIGHTS REQUIRES NLRA COVERED AGENCY FEE COLLECTIONS TO BE GOVERNED BY THE SAME PRINCIPLES AS ARE IMPOSED UPON UNION SECURITY PROVISIONS IN THE RAILWAY LABOR ACT, HAS CREATED A MULTI-CIRCUIT CONFLICT

The Second Circuit's new decision affirms its disagreement with this Court and with other circuits that have considered the issue of agency fee collections under the NLRA. This Court vacated the Second Circuit's former judgment following the decision in *Beck*. However, the subsequent legal proceedings demonstrate plain legal error that can only encourage further conflicts in the circuits. The grant of *certiorari* will reestablish a uniform approach to agency fee collections.[7]

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[7] The National Labor Relations Act covers virtually all private employment in the United States. Twenty-nine states have not enacted statutes proscribing union security provisions in collective bargaining agreements enforced in their jurisdictions. Some ninety per cent of union agreements adopted in those states,

The only United States courts of appeals to consider the issue have held that nonunion employees subject to compulsory unionism agreements under the RLA are entitled to the procedural safeguards required by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). *Dean v. TWA*, 924 F.2d 805, 808-10 (9th Cir. 1991); *Crawford v. Air Line Pilots Ass'n*, 870 F.2d 155, 159-60 (4th Cir. 1989) (reh'g en banc granted on other grounds).

In *Beck*, this Court unequivocally states the proposition that the Congress intended for NLRA § 8(a)(3) and RLA § 2, Eleventh to *have the same construction*:

> Our decision in *Street* however, is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and §2, Eleventh are in all material respects identical.

Beck, 487 U.S. at 745.

> Thus, in amending the RLA in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3)....In these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes.

Beck, 487 U.S. at 746-47.

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in industries covered by the NLRA, contain such provisions which limit the freedom of more than 6,000,000 workers.

Although there are no statistics on the amount of money collected by labor organizations as a consequence of compulsory unionism agreements, total dues in 1982 amounted to more than $1,422,945,000.00 for all parent labor organizations alone. L. Troy & N. Shelfin, *Union Source Book*, p. 4-1 (1985) (Lib. Cong. No. 85-14724) (extracted from Department of Labor LMRDA reports). Thus, substantial financial interests of both unions and millions of individual workers in interstate commerce are affected by the present uncertainty as to what may be required by a union security agreement authorized by the NLRA.

The court of appeals in the instant case ignored this entire point. It chose to answer the constitutional question of "state action" in the NLRA and by that act, readopt its vacated decision, *see* App. 6a, rather than applying the precedents developed under the First Amendment and the RLA to union security agreements under the NLRA as a matter of statutory construction. This refusal to consider the central point made in *Beck* led the Second Circuit to concentrate on a recitation of generalized duty of fair representation law, rather than concerning itself with the extent to which the teachings of this Court in agency fee cases under the RLA and under the First Amendment are determinative of the nature of that duty in this specific context.[8]

The Second Circuit reasoned that since the Court's *Beck* decision "expressly declined to rule on the state action issue, that decision does not in any way modify this Court's prior determination..." 6a. However, the Court's so-called "refusal" in *Beck* was entirely logical and not "constitutionally expedient," *Beck*, 487 U.S. at 762, because the restriction on agency fees to collective-bargaining uses has always been found to be a *statutory* limit on dues exactions under every federal labor statute, even where no constitutional ruling is rendered.

In *Railway Employees' Department v. Hanson*, 351 U.S. 225, 231-32 (1956), this Court first found that constitutional rights of objecting employees are inevitably implicated by the RLA because of the associational constraints mandated by the statute when an employer and union enter into a compulsory unionism

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[8] Petitioners argued their case in the alternative. They contended that if the compulsory unionism authorization in the RLA was the "statutory equivalent" of that in the NLRA, then the precepts developed by this Court in *Ellis v. Railway Clerks*, 466 U.S. 1883 (1984), would be dispositive. If not, then the court of appeals would be required to confront the "governmental action" issue raised by Congress' authorization of forced association with the union for any purposes (including other than bargaining unit activities). *See* Appellants' Brief at 7-15; Appellants' Reply Brief at 10-16.

agreement. But the question of free expression was not presented in that record. Under the circumstances, the Court held that Congress had properly exercised its authority under the Commerce Clause and not in violation of the First or Fifth Amendments when it authorized union security powers. *Id.* at 238. The Court expressly reserved the question of the constitutionality of the imposition of compulsory dues "for purposes not germane to collective bargaining." *Id.* at 235-38.

In *International Association of Machinists v. Street*, 367 U.S. 740, 750 (1961), the Court was confronted with this issue. However, it found that Congress intended for Section 2, Eleventh of the RLA to prohibit the collection and use of dues from objecting employees for political purposes. "One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." *Id.* at 764. Consequently, statutory interpretation made it unnecessary for the Court to reach the constitutional issue.[9]

Finally, in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court reaffirmed that Section 2, Eleventh of the RLA itself did not grant unions unfettered and unlimited power to "spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked." The Court emphasized that *Street*, "held that *the Act* does not

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[9] The Court also took the opportunity to reexplain *Hanson*: "this Court merely passed on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face and not as applied to infringe the particularized constitutional rights of any individual." 367 U.S. at 748. In *Street*, 367 U.S. at 749, the Court thought that the record was sufficient "squarely to present the constitutional questions reserved in Hanson. These are questions of the utmost gravity."

authorize a union to spend an objecting employee's money to support political causes." 466 U.S. at 438 (emphasis added).[10]

In the face of these decisions, the Second Circuit casually considers the constitutional question necessarily left open by this Court. It "adhered" to its earlier vacated opinion, resting on the fact that the RLA preempted all state imposed union security proscriptions ("right-to-work" laws), *Price*, 795 F.2d at 1133, rather than focusing on this Court's analysis that the preemption question discussed in the RLA cases of *Street* and *Hanson* had no significance. In *Beck*, 467 U.S. at 746 n.3, the Court emphasized that preemption was a red herring: "[t]his difference, however, *has no bearing* on the types of union security agreements that the statute permits, and thus *does not distinguish the union shop authorization of § 2, Eleventh* from that of § 8(a)(3). (Emphasis added).[11]

The court of appeals has utterly refused to follow this Court's instructions. Rather than interpreting and applying the language of § 8(a)(3) and § 2, Eleventh identically, App. 6a, it has chosen a path under which it ignores all the teachings of this Court in order to salvage its prior opinion.

The court of appeals nowhere discussed the actual language in *Hanson*, 351 U.S. at 231-32 & n.4, in which this Court found "state action" in Section 2, Eleventh of the RLA's authorization

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[10] The Court expressly alluded to the question of "governmental action" when it stated that "[t]he union, however, *could not, consistently with the Constitution*, collect from dissenting employees any sums for the support of ideological causes not germane to *its duties* as collective-bargaining agent." *Ellis*, 466 U.S. at 447 (emphasis added).

[11] *See also Beck*, 487 U.S. at 751 n.6, where the Court examined the statements of Senator Taft and concluded that the preemptive effect of the RLA on state law was not intended to "detract from the near identity of the provisions insofar as they confer on unions and employers authority to enter into union security agreements, nor does it undermine the force of Senator Taft's comparison with respect to this authority."

and potential judicial enforcement of compulsory unionism agreements. However, if that language is examined, it is clear that the Court did not singularly rely on the fact that section 2, Eleventh "expressly declares that state law is superseded," *id.* at 232, as the court of appeals here mistakenly assumed. The Court also cited *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1956), for its holding that "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Hanson*, 351 U.S. at 232.

The ultimate source of that power and authority was identified in *Steele* as the union's statutory *quasi*-legislative status as the employee's exclusive bargaining representative. *See Steele*, 351 U.S. at 198, 200, 202; *id.* at 208 (Murphy, J., concurring). And, because of the "governmental action" that inheres in the statutory grant of that status, *Steele* also recognized that the conduct of unions in using that status to deprive individual employees of statutory and constitutional rights is subject to the constitutional limitations found in the equal-protection and due-process clauses. *Id.* at 202-04.

Under both the RLA and the NLRA, the link between the union's status as the employees' exclusive representative and its privilege to negotiate a compulsory unionism agreement is as direct as explicit words can forge: RLA § 2, Eleventh and NLRA § 8(a)(3) both permit such agreements *only if* the labor organization is, in the language of the latter, "the [exclusive] representative of the employees as provided in section 159(a) of this title." 29 U.S.C. § 158(a)(3); *see Ellis*, 466 U.S. at 447-48; 45 U.S.C. § 152, Eleventh. For that reason alone, any compulsory unionism agreement under either statute necessarily partakes, fully and completely, of the "governmental action" that creates and infuses the status of the union as statutory exclusive representative. *See also Street*, 367 U.S. at 759-61 (explaining the symbiotic relationship between exclusive representation and compulsory unionism agreements).

Consequently, two other courts of appeals have held, in direct conflict with the decision below here, that the enforcement

of a compulsory unionism agreement authorized by NLRA § 8(a)(3) presents constitutional questions, despite section 14(b)'s permission to states to prohibit such agreements. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir.) (2-1 decision), *cert. denied*, 404 U.S. 872 (1981); *accord Buckley v. AFTRA*, 419 U.S. 1093, 1094-95 (1974) (Douglas, J., dissenting from denial of certiorari); *Lykins v. Aluminum Workers*, 510 F. Supp. 21, 24-26 (E.D. Pa. 1980). Thus, to the extent that the court of appeals' decision in this case rests on its holding that there is no state action in the enforcement of a compulsory unionism agreement under the NLRA, the case presents an important unsettled question of federal law on which the lower courts are in conflict.

On the other hand, to the extent that the Second Circuit's decision rests firmly on its application of the duty of fair representation, it is in direct conflict with this Court's decisions in *Ellis* and *Hudson*, and thus *Beck*, because, as discussed *supra* pp. 11-14, the nature of that duty in the collection of compulsory union fees is identical under the NLRA and RLA.

If "the exaction of fees beyond those necessary to finance collective-bargaining violates * * * the judicially created duty of fair representation," *Beck*, 487 U.S. at 742, then an exclusive representative also violates the duty of fair representation when it accomplishes that result by failing to establish a "procedure that fully protects nonassenting employees from illegal exactions." *Beck v. Communications Workers*, 776 F.2d 1187, 1203 (1985) (2-1 decision), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986) (6-4 decision), *aff'd*, 487 U.S. 735 (1988).[12] Indeed, this Court implicitly so held in *Ellis*, 466 U.S. at 443, when it held that the Railway Clerks' procedures were inadequate on "statutory" grounds. For, although this Court's decision in *Ellis* does not specify the nature of the objecting employees' statutory claims, they were claims for

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[12] The *Beck* panel majority cited *Hudson v. Chicago Teachers Local 1*, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986), for this holding.

breach of the duty of fair representation. *See Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2341, 2343 (1976) (interlocutory summary judgment), *incorporated*, 108 L.R.R.M. (BNA) 2648 (S.D. Cal. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984).

Moreover, the specific procedural safeguards which *Hudson*, 475 U.S. at 310, held to be "the constitutional requirements for the Union's collection of agency fees" also follow from the duty of fair representation.

The first flaw in the union's procedure in *Hudson*, for which advance reduction and escrow were prescribed as safeguards, was that it "merely offer[ed] dissenters the possibility of a rebate." 475 U.S. at 305-06 (explicitly following *Ellis*). *Ellis* held inadequate on *both* statutory and constitutional grounds a "rebate scheme" under which the union was "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place." *Ellis* identified "advance reduction of dues and/or interest bearing escrow accounts" as "acceptable alternatives" under the RLA. 446 U.S. at 443-44. As the RLA nowhere explicitly provides procedures for collection of compulsory union fees, the Court must implicitly have based its holding that the "rebate scheme" is statutorily "inadequate" upon the duty of fair representation: the exaction and later refund of monies to which the union is not entitled in the first place is both arbitrary and patently unfair.

The procedural safeguard prescribed for the second flaw in the union's procedure in *Hudson*, 475 U.S. at 306-07, that it "provided nonmembers with inadequate information about the basis for the proportionate share," also *flows directly* from the duty of fair representation. The fiduciary "obligation of fair dealing" which an exclusive representative owes to every employee in its bargaining unit "includes the duty to inform the employee of his rights and obligations" under a union-shop clause. *Electrical Workers (IUE) Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir.) (opinion by Burger, J.), *cert. denied*, 371 U.S. 936 (1962); *accord, e.g., Sheet Metal Workers Local 355 v. NLRB*, 716

F.2d 1249, 1254-55 (9th Cir. 1983). As later Chief Justice Burger explained, the "Union is the agent for employees and as such 'is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have * * * .'" *Electrical Workers Local 801*, 307 F.2d at 683 (quoting Restatement (Second) of Agency § 381 (1958)).

Logically then, under the duty of fair representation, as well as the First Amendment, the "union ha[s] a responsibility to provide procedures * * * that facilitate a non-union employee's ability to protect his rights" by giving him "a *fair* opportunity to identify the impact of the [agency shop] on his interests." *Hudson*, 475 U.S. at 303, 307 n.20 (emphasis added). Constitutional considerations aside, "*[b]asic considerations of fairness* * * * dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee" so that they may decide whether to object or not. *Id.* at 306 (emphasis added).

Finally, the third procedural safeguard mandated in *Hudson*, 475 U.S. at 307-08, the union's obligation to "provide for a reasonably prompt decision by an impartial decisionmaker," also is firmly grounded in the duty of fair representation. In the seminal fair representation case, *Steele*, 323 U.S. at 204 (emphasis added), the Court said,

> [w]herever necessary to th[e] end [of representing them "without hostile discrimination, fairly, impartially, and in good faith,"] the union is required to consider requests of non-union members of the craft and expressions of their views * * * *and to give them notice of and opportunity for hearing* upon its proposed action.

Self-evidently, where the union and nonunion employee have adverse interests in the "proposed action," as in the collection of compulsory service fees, fair representation, as well as the First Amendment, requires that the hearing be before an impartial decisionmaker, not union officials. *Compare Hudson*, 475 U.S. at 308 *with Steele*, 323 U.S. at 206. Only then will the nonmember

"have a *fair* opportunity * * * to assert a meritorious First Amendment claim" and "have his objections addressed in an expeditious, *fair*, and objective manner." *Hudson*, 475 U.S. at 303, 307 (emphasis added).

In sum, the *Hudson* procedural requirements apply fully under *both* the RLA and NLRA, either because both statutes' (identical) authorization of compulsory unionism agreements is governmental action, or because those procedural safeguards are mandated by the (identical) duty of fair representation in the enforcement of agency-shop agreements that both statutes impose on exclusive representatives. In holding to the contrary in this case, the Second Circuit has created a conflict among the courts of appeals and has repudiated this Court's teachings in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Beck* that nonunion employees are entitled to the same fundamental rights regardless of the statute under which they are compelled to pay union fees.[13] The Court should grant certiorari to reaffirm that principle and, if necessary, to resolve the conflict among the circuits on the important question of governmental action.

In *Abood*, 431 U.S. at 240, the Court believed that "[a]lthough *Street* and *Hanson* were concerned with statutory rather than constitutional violations, that difference surely could not justify any lesser relief in this case." "Unlike the Seventh Circuit, we are not convinced that resolution of the constitutional nongermaneness question will lead to appreciably different procedural requirements, and we thus find no need to reach the constitutional question." *Hudson*, 475 U.S. at n.13.

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[13] As the Court stated in *Abood*, 431 U.S. at 230, "[t]he very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees." Furthermore, "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

The only fair interpretation of these statements by the Court is that workers under various compulsory unionism statutes are entitled to be treated equally for purposes of procedural fairness. The opinion below revolutionizes the judicial landscape, and as explained more fully *infra*, has already established a discrete conflict between the circuits as to the treatment the union respondents' agency fee payor plan shall be accorded in diverse bargaining units.[14]

For these reasons, this Court should resolve the inherent conflict between its decisions and the Second Circuit's interpretation of § 8(a)(3) on NLRA agency fee payor policies and state a uniform procedural rule.

II.

THE SECOND CIRCUIT'S RULINGS THAT SPECIFIC ASPECTS OF THE UNIONS' REBATE PROCEDURE ARE ADEQUATE TO COMPLY WITH THE DUTY OF FAIR REPRESENTATION CONFLICTS WITH THIS COURT'S DECISION IN *HUDSON* AND ITS PROGENY IN OTHER CIRCUIT COURTS REACHING THESE IDENTICAL QUESTIONS

Because the procedural requirements of *Hudson* apply fully under the NLRA, whether as a matter of constitutional law or fair representation under § 9(a) and § 8(a)(3), the court of appeals' decision also conflicts with this Court's decisions and with decisions of other lower courts in its rulings on specific features of the unions' collection procedures. Three elements of the unions' plan are in issue: (1) the use of a so-called "local presumption" that bars disclosure of local union expenses and presumes that their proportions of chargeable-nonchargeable

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[14] This case presents the question of whether RLA and NLRA caselaw are interchangeable for the singular purpose of construing agency fee statutory requirements. On its face, this question may addressed by an order of summary reversal. *See United States v. Lone Motor Co.*, 344 U.S. 630 (1953).

activities are the same as the international union's; (2) the omission from the financial disclosure provided to petitioners of an independent auditor's verification of the amounts spent by the international union on chargeable activities; and (3) the use of non-consensual arbitration in which non-members unfairly have no power to participate in the arbitrator selection process.

A. The "Local Presumption"

The court of appeals held that "the use of the 'local presumption' is reasonable and therefore cannot constitute arbitrary or bad faith conduct by the Union." App. 11a. That holding is directly contrary to two decisions of the Sixth Circuit, the only other court of appeals that has ruled on the local presumption. The Sixth Circuit has twice held that the local presumption does not satisfy the requirements of *Hudson*, 475 U.S. at 306, 309, that all nonmembers must "be given sufficient information to gauge the propriety of the union's fee" and that objectors must be provided an "appropriately justified advance reduction." *See Cramer v. Matish*, Nos. 89-1885, -2077, slip op. at 5-7 (6th Cir. Nov. 2, 1990) (reprinted in App. 47a); *Lowary v. Lexington Local Bd.*, 903 F.2d 422, 430-32 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990). Indeed, the local presumption that was found inadequate in *Cramer* is identical to that here, because the defendant union there was the International Union, UAW, the respondent union here.

The Sixth Circuit correctly applied *Hudson* in holding the local presumption unconstitutional. *Hudson*, 475 U.S. at 307 n. 18, said that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor," for the *Hudson* defendant, a *local* union, as well as for "its affiliated state and national labor organizations." In short, *Hudson* requires disclosure for *all* levels of the union that receive a portion of the compulsory fees. *See Tierney v. City of Toledo*, 917 F.2d 927, 936-37 (6th Cir. 1990).

The court of appeals here reasoned that the "local presumption" is acceptable, because the union has the burden of proof if

the presumption is challenged in arbitration. However, *Cramer* and *Lowary* held that the presumption *does not* satisfy *Hudson* on two grounds that apply *regardless of who has the burden of proof in arbitration*: it permits the union "to avoid providing audited and detailed financial statements to nonmembers concerning the local," union which *Hudson* requires so that nonmembers have enough information to "make an informed decision" to object or not; and, it increases the risk that the fee collected will, at least temporarily, be constitutionally excessive. *Lowary*, 903 F.2d at 431-32; *accord Cramer*, slip op. at 6-7 (App. 53a).

The court of appeals here also sought to justify the local presumption by citing the statement in *Hudson* that "'[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" 475 U.S. at 307 n.18 (*quoting Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)) (emphasis added). However, precision still is required, because "'*[p]recision* of regulation *must be the touchstone*' in the First Amendment context." *Hudson*, 475 U.S. at 303 n.11 (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)). That same precision is required by the duty of fair representation, which "imposes on the statutory representative * * * at least as exacting a duty to protect equally the interests" of the employees it represents "as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." *Steele*, 323 U.S. at 202.[15]

B. No Independent Verification of Chargeable Expenses

The report provided by the UAW to objecting nonmembers under its procedures included a letter from its certified public accountant which shows that the unions only engaged him to

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[15] Since *Cramer* is *res judicata* against the UAW, this error by the court of appeals is particularly egregious. It is clearly unfair and arbitrary for the same union to use an imprecise presumption in calculating what it charges nonmembers under the NLRA, while using actual expenses in calculating what it charges in the public sector, as the UAW must do, at least in the Sixth Circuit.

audit its total expenditures, *i.e.*, to verify that expenditures were made in certain pre-existing accounting categories. He did not in any way audit the unions' allocation of which expenses in those categories were chargeable to nonmembers. (C.J.A. 193).[16] The court of appeals found this limited verification sufficient to satisfy the unions' duty of fair representation on the ground that the "usual function of an auditor * * * does not require that the auditor make a legal decision as to the appropriateness of the allocation of expenses to the chargeable and non-chargeable categories." App. 10a. However, that rationale is, in part, a "red herring," and its misapplication here puts the court of appeals' decision in conflict with *Hudson* and the decisions of other lower federal courts.

Hudson, 475 U.S. at 306-07 & n.18 (emphasis added), held that, to be adequate, the disclosure to nonmembers of "the basis for" the portion of dues that the union demands from them must "*identif[y] the [major categories of] expenditures* for collective bargaining and contract administration * * * *for which nonmembers* * * * *can fairly be charged a fee*," verified "by an independent auditor." In context, it is that identification of expenses as chargeable or not that must be verified, as other federal courts have held, *Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511, 514-16, *further proceedings*, 744 F. Supp. 940-41 (C.D. Cal. 1990); *Hohe v. Casey*, 727 F. Supp. 163, 165-67 (M.D. Pa. 1989); *see Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991); *Tierney v. City of Toledo*, 824 F.22d 1497, 1504-06 (6th Cir. 1987), not just total expenses in pre-existing normal account-

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[16] The respondents also submitted the affidavit of accountant Karen Houser Johnson, C.J.A. 174, 189 ¶ 27, 190 ¶ 29, who admits "[w]ith respect to the 1987 Fee Report, it was the UAW, and not our Firm, which determined which categories of expenditures were chargeable and which were nonchargeable under applicable law. Thus, in the 1987 Fee Report, the UAW was responsible for determining which of the various audited categories of UAW expenditures taken from our Audit Report were either chargeable or nonchargeable....As stated above, our Firm did not review or verify the UAW's characterization and allocation of any particular category of expenditure as legally chargeable or nonchargeable."

ing categories, which are largely irrelevant to describing the agency fee or how it is calculated.

Indeed, *Hudson* itself assumed that accountants can audit chargeability allocations. *Hudson*, 475 U.S. at 310 (emphasis added), held that a union need not establish a 100% escrow, but only could if there is "*a certified public accountant's verified breakdown* of expenditures, including some categories that no dissenter could reasonably challenge."

That does not necessarily mean, as the court of appeals here believed, that the auditor must make legal determinations:

> All the auditor need do is verify that the expenditures made by the union were indeed actually made and verify that they have been allocated in accordance with certain disclosed criteria. Allocation of expenses in accordance with stated criteria is not unfamiliar to outside auditors. It is a routine part of their professional services.

Mitchell, 739 F. Supp. at 615 n.7; *accord id.* at 616.

This does mean that the auditor must verify the chargeable-/non-chargeable allocation, not just total expenditures by category as was done here, because it is the "allocation, not the total expenditures for major expense categories, that is utilized to compute the *pro rata* percentage of union dues properly assessable as an agency fee against non-members" and provides information from which nonmembers can decide whether an objection is worth pursuing. *Id.* at 514-15; *accord Hohe*, 727 F. Supp. at 167.[17]

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[17] Petitioners do not concede that an auditor cannot and should not also verify whether the unions have legal authority which reasonably supports their allocations. That also is a *factual*, not legal, inquiry of the sort which accountants typically make when their services affect the interests of third parties. *See, e.g.,*

The lack of verification of the chargeability allocation is not justified by the fact that "the Union's figures can be subsequently reviewed by an independent arbitrator," as the court of appeals erroneously argued. App. 10a. *Hudson*, 475 U.S. at 309 (emphasis added), held that *both* the "*appropriately justified* advance reduction *and* the prompt, impartial decisionmaker are *necessary* to minimize both the impingement [of the agency shop itself on the nonunion employees' First Amendment interests] and the burden" of objection. The advance reduction is not "appropriately justified" if it is not independently verified to provide some assurance that the union has not set the amount of the fee too high out of self-interest. *See Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *Tierney*, 824 F.2d at 1503-04. To hold otherwise, as the court of appeals did, leaves the union (the UAW here) as a decisionmaker in its own cause.

C. Selection of the Impartial Decisionmaker

Hudson, 475 U.S. at 308 n.21 (emphasis added), speculated in *dicta* "that an expeditious arbitration *might* satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice." On the authority of its prior decision in *Andrews v. Education Ass'n*, 829 F.2d 335, 340-41 (2d Cir. 1987), the court of appeals held that sufficient impartiality exists where the decisionmaker is named by a wholly private organization, the AAA, chosen unilaterally by the unions to make that appointment. App. 11a. However, in *Ellis*, 466 U.S. at 443-44, this Court held that a compulsory union fee collection procedure is inadequate under the RLA and the First Amendment if "there are readily available alternatives * * * that place only the slightest additional burden, if any, on the union." Even without considering other facts as to the AAA, there obviously are readily available, fairer methods of selecting a decisionmaker for challenges to compulsory fees.

United States v. Arthur Young & Co., 465 U.S. 805, 812, 817-19 (1984).

A "fundamental characteristic of arbitration" is mutual "selection of the arbitrators by the parties to the dispute." *Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); *see* F. Elkouri & E. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985); O. Fairweather, *Practice and Procedure in Labor Arbitration* 79-90 (2d ed. 1983) (texts cited in *Hudson*, 475 U.S. at 308 n.21). Thus, one readily available and fairer alternative to selection by the AAA is mutual selection by the union and the nonmembers or representatives of their interests. Another is appointment by a government agency, *e.g.*, the Federal Mediation and Conciliation Service or a state labor agency. It may be presumed that governmental adjudicators are impartial. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986). However, no such presumption attaches where nongovernmental decisionmakers are not mutually selected by both parties to a dispute. *See Steele*, 323 U.S. at 206; *Associated Plumbing & Mech. Contractors*, 811 F.2d at 483-84.

Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *see Aetna Life Ins. Co.*, 475 U.S. at 825. Here, the appearance — and actuality—of bias is shown by more than just the fact that nonmembers play no part in selecting the AAA or the individual arbitrator who determines their challenges.

The record here contains evidence demonstrating, as the court of appeals conceded, "an appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that respondent UAW's lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in" labor relations. App. 11a; *see* C.J.A. 146. More specifically, that evidence shows that the arbitrators in the pool for service-fee cases had to be recommended and regularly employed by unions to arbitrate disputes between them and management, but no effort was made to determine their acceptability to nonunion employees. R-95,

AAA President Robert Coulson Deposition at 132-37, 146-55, 159-65, 173-75, Meade Deposition at 17-22, 63-73, 136-38.[18]

The court of appeals followed *Andrews*, in concluding that an "appearance of bias" is insufficient to disqualify the AAA scheme. However, the cases cited by *Andrews*, 829 F.2d at 340-41, for the proposition that "generalized bias" is not a sufficient basis on which to reject selection by the AAA involved judges, state administrative tribunals, and arbitrators appointed by agreement of the parties. *None* involved a non-governmental decisionmaker unilaterally selected by a private organization without agreement of both parties to the dispute. Moreover, the court of appeals' rationale conflicts with the logic of this Court's cases on the due-process right to an impartial tribunal, including *Hudson*.

As Justice Marshall said in *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion), "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." Consequently, the scheme for selecting an arbitrator was struck down in *Hudson*, 475 U.S. at 308, not because there was proof that any particular arbitrators were biased, but because the arbitrator's "selection represents the Union's unrestricted choice from the state list." In other words, the *general system* presented an unacceptable appearance and risk of bias, even though all

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[18] It is reasonable to infer that arbitrators whose livelihood depends upon employment by unions to arbitrate disputes with management, but who have no commensurate financial interest in being fair to nonmembers, inevitably have at least an unconscious bias toward unions in service-fee disputes. *Cf. Albion Public Schools v. Albion Educ. Ass'n*, 130 Mich. App. 698, 702-03, 344 N.W.2d 55, 57-58 (1983), *appeal denied*, 419 Mich. 944 (1984) (arbitrator's employment by union to resolve agency-shop disputes in intra-union scheme "might reasonably give someone who is considering his services as an arbitrator [in a labor dispute with the union] the impression that he might favor one litigant over the other"); *see generally Commonwealth Coatings Corp.*, 393 U.S. at 147-50.

individuals on the state's list may have been without actual bias.[19]

Andrews, 829 F.2d at 340, also relied on the fact that under the AAA's rules "the arbitrator may be removed for cause by the parties or if the personal disclosure mandated by the AAA reveals that the arbitrator is potentially biased." That is factually incorrect. The AAA's special rules for "Union Fees" require the arbitrator to disclose to the AAA before appointment "any circumstances likely to create a presumption of bias," and allow nonmembers to "challenge an Arbitrator for cause." However, unlike the AAA's general rules for arbitration, these special rules do not require the AAA to disclose such circumstances *to the parties to the dispute* (*i.e.*, nonmembers), and disqualification is at the *discretion of the AAA*, not peremptory unless waived by both parties. *Compare* C.J.A. 146-48 (the special AAA rules) *with Commonwealth Coatings Corp.*, 393 U.S. at 149. Such an arrangement was held to violate due process in *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir. 1959) (affirmed on the district court's "succinct and careful opinion"), a decision cited with approval in *Commonwealth Coatings*, 393 U.S. at 148 (equating constitutional due process and due process under the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982)).

In *Rogers*, a prospective replacement arbitrator informed the AAA that he had done business with one party to a dispute. Interpreting its rules as not requiring disclosure to the parties of circumstances bearing on whether there is a presumption of bias when it fills a vacancy, and concluding that the facts were insufficient to require disqualification, the AAA permitted the arbitration to proceed without disclosing the replacement's prior

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[19] *Cf. Hudson*, 475 U.S. at 307, where the Court in dicta questioned the rebate procedure there that allowed for "review by a Union-selected arbitrator is also inadequate because the selection represents the Union's unrestricted choice from the state list." Here, union officials compiled the list of arbitrators from which AAA made the selection.

employment to the other party. The court vacated the award on the ground that it was "evidently partial."

The holding in *Rogers* applies here:

> [Wh]en the Association is informed by a prospective arbitrator * * * of circumstances which are "likely to create a presumption of bias," *nothing less than a prompt communication of such disclosure to the parties * * * provides the affected party with an opportunity to challenge "for cause."* Nor is it sufficient for the Association to take the position that it weighed the disclosure and concluded that it did not affect the eligibility of the proposed arbitrator. * * * The party may well have a sensitivity to the disclosure not realized by the appointing authority, and * * * it should not be deprived of at least the opportunity to convince the appointing authority of the desirability of selecting a replacement * * * .

165 F. Supp. at 300 (emphasis altered). The failure to communicate information to the parties bearing on possible bias, "goes to the heart of a body designed to resolve controversy—its integrity," and "fails to protect what might be termed 'due arbitration process.'"

Thus, as a matter of law, selection of an arbitrator by the AAA does not satisfy *Beck*. This fundamental question has yet to be considered by this Court and should now be resolved to ensure that non-members are afforded *truly* impartial decision-makers for their challenges to compulsory fees.

CONCLUSION

This case presents important issues left open in *Beck*. Plenary review of these issues is necessary to ensure the uniform treatment of nonunion employees under the federal labor statutes which *Beck* contemplated, and to resolve the conflicts among the lower federal courts concerning the nature of the procedural safeguards that are required in the collection of compulsory union fees.

For these reasons, petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Petitioners

Dated: May 31, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 701 - August Term 1990

Argued: November 30, 1990 Decided: March 4, 1991

Docket No. 90-7652

ROBERT PRICE, all others similarly situated; DELORIS BLANCO, DONALD RAFFO, JAMES Q. RYLEY, CHARLES P. CRANDALL, III, et al.,

Plaintiffs-Appellants,

-v.-

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO and ELECTRIC BOAT DIVISION, GENERAL DYNAMICS CORPORATION,

Defendants-Appellees.

Before: Oakes, *Chief Judge*, Cardamone, *Circuit Judge*, and John E. Sprizzo, *District Judge*.*

Appeal from judgment entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, Judge,

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*The Honorable John E. Sprizzo, United States District Judge for the Southern District of New York, sitting by designation.

denying appellants' motions for a preliminary injunction, dismissing their constitutional claims, granting summary judgment dismissing their claims based upon the Union's duty of fair representation, and dismissing the complaint against appellee General Dynamics.

Judgment affirmed.

JORDAN ROSSEN, and MICHAEL B. NICHOLSON Michigan (International Union, UAW), and GREGG D. ADLER, Hartford, Connecticut (Gould, Livingston, Adler & Pulda), of counsel, *for Appellee Unions*

MICHAEL E. AVAKIAN, North Springfield, Virginia (Center on National Labor Policy), of counsel, *for Plaintiffs-Appellants*

ARTHUR G. TELEGEN, Boston, Massachusetts (Foley, Hoag & Eliot), of counsel, *for Appellee Electric Boat Division, General Dynamics Corporation*

SPRIZZO, *District Judge*:

Appellants are present or former employees of General Dynamics Corporation, Electric Boat Division (hereinafter "GD"), and are or were members of a collective bargaining unit represented by appellee International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Marine Draftsmen's Association, UAW Local 571 (hereinafter collectively the "UAW" or the "Union"). Although appellants are members of the bargaining unit, they are not members of the Union. Their allegations against their employer and the Union arise out of what is commonly referred to as a "union shop" clause contained in the collective bargaining agreement between the Union and the employer. The clause requires all bargaining unit employees, as a condition of employment, to pay initiation

fees and dues in an amount equal to that paid by Union members.

Shortly after the collective bargaining agreement was entered into, appellants informed the Union that they wanted a percentage reduction in their dues and fees because they objected to the Union's use of those funds to support political and ideological causes unrelated to its role as collective bargaining representative. Appellants contended that the payment of the full amount of dues and fees violated their First Amendment speech and associational rights and their Fifth Amendment due process rights, and, in addition, constituted a breach of the Union's duty of fair representation. In response to appellants' request for a reduction in fees, the Union initially demanded that the full amount be paid and stated that it would seek their discharge upon nonpayment of said dues. Similarly, the employer notified appellants that they would be terminated for nonpayment. Rather than risk discharge, appellants paid their dues and fees in full. Appellants then filed suit in the United States District Court for the District of Connecticut seeking a declaratory judgment that the Union's use of those funds was constitutionally and legally improper as well as injunctive relief and damages.

The United States District Court for the District of Connecticut, M. Blumenfeld, Judge, denied appellants' request for a preliminary injunction, finding that they had failed to show either irreparable injury or likelihood of success on the merits. *See* Memorandum and Order (Dec. 27, 1984). Thereafter, both appellants and the Union cross-moved for summary judgment and GD moved to dismiss for failure to state a claim. The district court granted the Union's motion for summary judgment and GD's motion to dismiss and denied appellants' motion for summary judgment. *Price v. International Union, UAW*, 621 F. Supp. 1243 (D. Conn. 1985). Judge Blumenfeld found that appellants' constitutional claims were unfounded because there was no government action in that neither the Union nor GD were government actors. *Id.* at 1246-50. The district court also held that the Union's duty of fair representation was not implicat-

ed in this employee-union dispute. *Id.* at 1250-52. This Court affirmed the judgment of the district court. *Price v. International Union, UAW*, 795 F.2d 1128 (2d Cir. 1986).

Concurrently, the Court of Appeals for the Fourth Circuit, after hearing the identical issue and rehearing it en banc, concluded (6-4) that the Union's duty of fair representation was implicated, but were divided on the constitutional issues raised. *Beck v. Communications Workers of America*, 800 F.2d 1280 (4th Cir. 1986). Five of the ten judges of the Fourth Circuit panel believed that there was insufficient state involvement to support the constitutional claims, two judges felt these claims were valid, and three judges declined to reach the constitutional issue, relying solely on appellants' statutory claims to provide relief. *Id.* at 1282. The Supreme Court then granted certiorari in *Beck*, 482 U.S. 904 (1987), and affirmed the decision of that court. 487 U.S. 735 (1988).

The Supreme Court found that in cases of agency shop agreements the law permitted the Union to exact from non-Union member employees only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988) (quoting *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 448 (1984)). Thus, bargaining for and entering into agreements which call for payments to support Union activities beyond those germane to collective bargaining were found to be violative of the Union's duty of fair representation. *Id.* at 762-63. The Court, however, expressly declined to rule on the state action issue. *Id.* at 761. After the decision in *Beck*, the Supreme Court vacated this Court's judgment and remanded it for further consideration in light of *Beck*. 487 U.S. 1229 (1988). This Court in turn remanded the matter to the district court for the same purpose.

On remand, the district court, Dorsey, J., denied appellants' resubmitted motion for a preliminary injunction and found that

appellants could only demonstrate irreparable injury to the extent that their First Amendment rights were violated. The court further held that no First Amendment violation could be found in view of this Court's previous ruling which was unaffected by the Supreme Court's decision in *Beck*. *Price*, 722 F. Supp. 933, 935-37 (D. Conn. 1989). The district court therefore granted the Union's motion to dismiss the First and Fifth Amendment claims "given the absence of state action to support those claims." *Id.* at 937.

The district court also granted the Union's motion for summary judgment as to any alleged post-*Beck* violations because the Union had presented a rebate plan which clearly satisfied its duty of fair representation. *Id.* at 937-40.[1] Finally, the district court dismissed the complaint against GD as to any post-*Beck* claims finding that GD had not acted arbitrarily or unfairly. *Id.* at 940.[2]

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[1] Additionally, the district court determined in a subsequent opinion that *Beck* should be applied retroactively and that appellants had therefore stated a violation of the duty of fair representation against the Union prior to the implementation of the rebate plan. *See* Joint Appendix at 49-50 (hereinafter "A.") However, the conduct of the Union prior to their adoption of the objection procedures for nonmembers is not at issue on this appeal. *See* Brief of UAW Appellees at 1-2.

[2] Also in a subsequent opinion, the district court dismissed any pre-*Beck* claims against GD finding that plaintiffs had alleged nothing from which to conclude that GD "participated" with the Union in arbitrary activity under *Vaca v. Sipes*, 386 U.S. 171 (1967). *See* J.A. at 64. However, as with the case with respect to the Union, the only conduct by GD that is an issue in this appeal is conduct engaged in subsequent to the Supreme Court's decision in *Beck*. *See* Appellants' Brief in Reply at 6.

DISCUSSION

A. The Constitutional Claims

The validity of appellants' First and Fifth Amendment claims, as this Court noted in the previous appeal, depends upon the existence of state action. *See Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 461 (1952).[3] Since the Supreme Court in *Beck* expressly declined to rule on the state action issue, that decision does not in any way modify this Court's prior determination that the union shop agreement at issue is "a product of private negotiations and [is] not attributable to the government." *Price*, 795 F.2d at 1133. Consequently, this Court adheres to its previous holding that appellants' constitutional claims must fail for want of governmental action.

Appellants assert that like Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1982) (hereinafter "RLA"), Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3)(1982) (hereinafter "NLRA"), establishes the requisite state action to support their constitutional claims. Appellants rely on a line of cases which found state action based upon nearly identical language under the RLA. *See Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956); *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). However, this Court previously held that the finding of state action under Section 2, Eleventh of the RLA rests squarely on the fact that the RLA expressly preempts contrary state law. *Price*, 795 F.2d

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[3] To find state action, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the state." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). Thus, state action requires that: (1) the deprivation must be caused by the exercise of some right or privilege created by the state; and (2) the party charged with the deprivation must be a state actor. *Id.* at 937.

at 1133. The NLRA, in contrast, contains no similar preemption of state law.

B. The Duty of Fair Representation

A union's duty of fair representation is a judicially implied duty which arises from Sections 8(b) and 9(a) of the NLRA. *See* 29 U.S.C. §§ 158(b), 159(a) (1988). This duty requires a union to "represent fairly the interests of all bargaining-unit members during the negotiation, administration and enforcement of collective-bargaining agreements," *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979), and is breached "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

Appellants contend that under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and its progeny in the lower courts, the post-*Beck* procedures for establishing fees for non-Union members violate the Union's duty of fair representation. In *Hudson*, the Supreme Court announced certain "constitutional requirements" for the administration of public sector agency shop agreements. *Id.* at 310.[4] However, since the *Hudson* case in-

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[4]The Union in *Hudson* determined that the proportionate share of dues to be assessed on nonmembers was 95%. A nonmember could contest this amount by submitting a written objection to the Union President. The objection would then be considered by the Union's Executive Committee and again by the Union's Executive Board on appeal. If the objector still wanted to protest the decision, the Union's President would select an arbitrator. If the objection was sustained at any stage, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector. "The Union's procedures did not survive 'First Amendment scrutiny.'" *Id.* at 304. The Court there found the Union's procedures to contain three constitutional defects. First, the possibility of a rebate failed to minimize the risk that non-Union employees' contributions might be temporarily used for impermissible purposes; *Id.* at 305, second, the procedures failed to provide nonmembers with adequate information about the basis for the proportionate

volved public employees, state action was concededly involved and it was therefore necessary to impose heightened procedural safeguards "to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Id.* at 303, n.12. Here, no state action is involved and there are thus no constitutional concerns which warrant the safeguards found necessary in *Hudson*. Instead, it is necessary only that the procedures employed not be arbitrary, discriminatory, or implemented in bad faith. *Sipes*, 386 U.S. at 190.

The procedures implemented by the Union since *Beck* are more than adequate to meet that standard. The Union has reduced the fees charged nonmembers to 85.4% of the full fees which, according to the Union, represents the percentage of dues attributable to collective bargaining activities. Additionally, the Union has placed a sum representing the entire projected 85.4% reduced payments of all non-Union appellants into an interest bearing account, which monies cannot be used by the Union until an independent arbitrator has reviewed the Union's percentage determination referred to above. *See* Brief of UAW Appellees at 6-7.

Moreover, the procedures now in place for resolving objections to the Union's determination cannot be fairly characterized as arbitrary. On May 15 of each year, after a year-end audit, the Union will issue a Report of Expenditures Incurred in Providing Collective Bargaining Related Services (the "Report") which will set forth the percentage of funds spent for chargeable and non-chargeable activities, as well as the major categories of expenditures and whether the Union denominates them as chargeable or non-chargeable to collective bargaining activities. *See* Brief of UAW Appellees at 5. This report will then be mailed to each nonmember who has filed an objection with the Union in the preceding twelve months and to those persons who subsequently

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share; *Id.* at 306, and third, the procedures did not provide for a reasonably prompt decision by an impartial decisionmaker; *Id.* at 306.

file new objections. Within forty-five days of issuance of the Report, any non-Union employee can challenge the Report by informing the Union in writing. These objections must be renewed annually. *See* Brief for UAW Appellees at 5. All said challenges will then be resolved by reference of the dispute to the American Arbitration Association (the "AAA") pursuant to its Rules for Impartial Determination of Union Fees (the "Rules"). Under the Rules, the AAA will select an arbitrator to determine the validity of the challenge and the Union will bear the burden of justifying the fees that are in dispute. The arbitrator's decision must be issued within a sixty day period. *Id.* at 5-6.

Appellants contend the aforesaid procedures do not satisfy the Union's duty of fair representation because: (1) no independent auditor makes the determination as to whether Union expenditures listed in the Report are chargeable or non-chargeable; (2) the Union assumes for accounting purposes that the allocation between chargeable and non-chargeable expenditures for the UAW is equivalent to the allocation for each of its 1189 local unions (the so-called "local presumption"), an assumption which they allege is inaccurate and unsupported; and (3) the AAA procedures for the selection of an arbitrator are improper. We find no merit to appellants' contentions.[5]

With respect to the claim that the Union's report must be prepared and certified by an independent auditor we are not

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[5] Appellants raised a fourth objection in the district court, apparently based on the *Hudson* case, that the Union's annual expenditure Report is not sufficiently detailed to provide for an informed objection. The district court addressed this claim and found that under the *Sipes* standard, the Report contains information sufficient to preclude a finding that its use was arbitrary, discriminatory or in bad faith. J.A. at 41. Appellants appear to have abandoned that claim on appeal in that it was not mentioned in their briefs or at Oral Argument. In any event, we agree with the district court that the information to be listed in the Report satisfies the *Sipes* standard.

persuaded that the Union's duty of fair representation is breached by the failure to have an independent auditor review the Union's decision as to what is a chargeable and non-chargeable activity. Even in a constitutional context, as this Court stated in *Andrews v. Education Ass'n*, 829 F.2d 335 (2d Cir. 1987), *Hudson* requires only that the usual function of an auditor be performed, *i.e.*, to determine that the expenses claimed were in fact made. That function does not require that the auditor make a legal decision as to the appropriateness of the allocation of expenses to the chargeable and nonchargeable categories. *Andrews*, 829 F.2d at 340. In *Andrews*, which involved a challenge by nonmembers of a teachers union to proposed procedures for determining agency fees, where concededly constitutional claims were involved, the court held that the allocation of chargeable and non-chargeable expenses by the Union need not be audited. Moreover, where, as here, the Union's figures can be subsequently reviewed by an independent arbitrator, we perceive no basis to infer irrationality or bad faith in the use of the procedures employed by the Union.

Nor are we persuaded that the use of a so called "local presumption" breaches the Union's duty of good faith merely because, as appellants contend, the "local presumption" provides no information as to whether or not the local union made any bargaining unit related expenditures, and thus shifts the burden of proof from the Union to the objectors. Under the post-*Beck* procedures implemented by the Union, any objector need not accept the Union's use of the "local presumption" but may challenge it in arbitration. In the event of such a challenge the Union bears the burden of proving that the local union's expenditures are chargeable to the degree asserted by the Union. Brief of UAW Appellees at 34. Moreover, as the district court in *Andrews* noted in upholding the use of the "local presumption": the Supreme Court has repeatedly recognized that "there are practical reasons why 'absolute precision' in the calculation of the charge to non-members cannot be 'expected or required.'" *Andrews*, 653 F. Supp. at 1378 (quoting *Hudson*, 475 U.S. at 307

n.18). That conclusion was not challenged on appeal in *Andrews*. 829 F.2d at 338 n.1.

Appellants' reliance on *Cramer v. Matish*, Nos. 89-1885, 89-2077 (6th Cir. Nov. 2, 1990), is misplaced. That case, like *Hudson*, was concerned with constitutional safeguards, and has little, if any, applicability where, as here, the only issue is whether the use of a "local presumption" is reasonable and therefore cannot constitute arbitrary or bad faith conduct by the Union.

Appellants' contention that the use of the AAA rules to select an impartial arbitrator constitutes arbitrary conduct by the Union is also without merit. This Court has already held that the selection of the impartial decisionmaker through the AAA Rules meets the more stringent procedural requirements set forth in *Hudson*. *Andrews*, 829 F.2d at 340. Moreover, in *Andrews* we held that even where constitutional concerns were present, the mere appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that union lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in "public sector labor relations," was not sufficient to render these procedures constitutionally suspect. *Andrews*, 829 F.2d at 341. *See* also *Pitta v. Hotel Assoc.*, 806 F.2d 419 (2d Cir. 1986) ("The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator."). It follows that, where, as here, constitutional concerns are not present, the use of AAA selection procedures cannot constitute bad faith or arbitrary conduct by the Union.

Appellants' last contention is that the district court erred in dismissing its complaint against GD because GD failed to act reasonably subsequent to the Supreme Court's decision in *Beck*. The basis for this claim is that GD did not immediately cease requiring full dues from non-Union members following the *Beck* decision and that GD did not contest the percentage fee amount established by the Union. This claim lacks merit. It hardly would

have been reasonable to expect the employer to implement the procedures required by *Beck* instantly and we agree with GD's contention that those procedures were implemented with reasonable speed especially since appropriate refunds of non-chargeable amounts were made to non-Union members.

Nor are we aware of any authority supporting appellants' contention that where an employer acts as an agent for the collection of Union dues, it may be found to have participated in a breach of the Union's duty of fair representation or to have breached the collective bargaining agreement merely because it has not challenged the post-*Beck* procedures implemented by the Union. Thus, the district court did not err in dismissing the complaint against GD.

Finally, the district court properly denied appellants' motion to enjoin appellees from exacting fees until final determination of appellants' agency fee obligations. As the district court observed, appellants claim constitutional and monetary injury. The allegations of constitutional injury fail for want of governmental action. *See supra*. And insofar as the alleged injury is simply monetary, it does not rise to the required level of irreparable harm, *see Jackson Dairy, Inc. v. H. P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979), especially in light of the fact that any overpayment remains in escrow pending a final adjudication, *see Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("'The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm.'") (quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Hohe v. Casey*, 868 F.2d at 72-73 (3d Cir. 1989) (denying preliminary injunction to prevent collection of fair share deductions where fees placed in interest-bearing escrow account until disposition of challenge).

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March, one thousand nine hundred and ninety-one.

Present: HON. JAMES L. OAKES, Chief Judge
HON. RICHARD J. CARDAMONE, Circuit Judges,

HON. JOHN E. SPRIZZO, District Judge*

ROBERT PRICE, all others similarly situated;
DELORIS BLANCO, DONALD RAFFO, JAMES Q. RYLEY, CHARLES P. CRANDALL, III, et al.,

Plaintiffs-Appellants,

-v.- Docket No. 90-7652

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO and ELECTRIC BOAT DIVISION, GENERAL DYNAMICS CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Connecticut District of New York [sic].

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*Hon. John E. Sprizzo, of the United States District Court for the Southern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Connecticut District of New York and was argued by counsel [sic].

ON CONSIDERATION WHEREOF, it is now hereby ordered. adjudged and decreed that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith, Clerk
By:

Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE: March 27, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT PRICE, et al.	:	
vs.	:	Civil No. H-84-1221 (PCD)
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al.	:	

May 31, 1989, Decided
June 1, 1989, Filed

RULING ON PENDING MOTIONS

Background

This action is on remand for further consideration in light of *Communications Workers of America v. Beck*, 487 U.S. ___, 108 S. Ct. 2641 (1988). Plaintiffs are 252 present or former employees of General Dynamics Corporation ("General Dynamics"), Electric Boat Division, in Groton, Connecticut, who were at various times members of a collective bargaining unit represented by defendants, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and Marine Draftsmen's Association, UAW Local 571 ("UAW Local 571") (hereinafter collectively the "UAW" or "Union"). Plaintiffs, as non-Union member employees,[1] brought suit in

[1] As of this writing, half of the 252 plaintiffs——126 in all——had either quit or retired or transferred to employment with General Dynamics outside of the relevant bargaining unit. Of the 126 plaintiffs still in the bargaining unit, 15 are now members of the UAW. The remaining 111 plaintiffs are not UAW

1984 challenging the "agency shop"[2] requirement that they pay full Union dues and initiation fees. Plaintiffs claimed that such arrangements violated their first and fifth amendment rights and the Union's duty of fair representation, to the extent that such monies were expended by the Union on non-collective bargaining activities such as lobbying, political contributions, and organizing efforts.

Judge Blumenfeld denied plaintiffs' initial application for a preliminary injunction, *see* Memorandum and Order (Dec. 27, 1984), and subsequently granted defendants' motion for summary judgment. 621 F. Supp. 1243 (D.Conn. 1985). Judge Blumenfeld found that plaintiffs' constitutional claims were unfounded for lack of state action and that the Union's duty of fair representation was not implicated in this employee-union dispute. *Id.* at 1250-51. The Court of Appeals for the Second Circuit affirmed in toto. 795 F.2d 1128 (2d Cir. 1986).

Concurrently, the Court of Appeals for the Fourth Circuit, after hearing the identical issue and rehearing it en banc, concluded (6-4) that the union's duty of fair representation was implicated, but remained split on the constitutional question. *Beck v. Communication Workers of America*, 800 F.2d 1280 (4th Cir. 1986). Five of the ten judges of the Fourth Circuit panel felt there was insufficient state involvement to support the constitutional claims, two judges felt constitutional challenges were valid, and three judges declined to reach the constitutional issue, having found the plaintiffs' statutory claims sufficient to confer jurisdiction and, therefore, provide a basis for relief. *Id.*

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members.

[2] [T]he term "agency shop" applies to an arrangement under which all employees are required as a condition of employment to pay dues to the union and pay the union's initiation fee, but they need not actually become union members. *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963).

Given this conflict between the circuits, the Supreme Court granted certiorari, 482 U.S. 904 (1987), "to resolve the important question concerning the validity of such [agency shop] agreements." *Beck*, 108 S. Ct. at 2646. The Supreme Court found that the Union's duty of fair representation was at issue and that agency shop agreements were limited to exacting from non-union member employees "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues.'" *Id.* at 2657, quoting *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 488 (1984). Thus, bargaining for and entering into agreements which call for payments "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment" were found to be violative of the Union's duty of fair representation.[3] *Id.* at 2648.

The Court vacated the Second Circuit's judgment in this case and remanded it for further consideration in light of *Beck*. 108 S. Ct. 2890 (1988). The Second Circuit in turn vacated and remanded here.

Pending Motions

Upon remand, plaintiffs submitted a proposed order for preliminary injunctive relief,[4] to which defendants responded. The Union defendants, in turn, moved to dismiss plaintiffs'

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[3] The Supreme Court declined to rule on the constitutional "state action" issue. *Beck*, 108 S.Ct. at 2656-57.

[4] After the Supreme Court remanded this case to the Second Circuit, but before the Second Circuit could remand it to this court, plaintiffs moved for a preliminary injunction in the Second Circuit, which referred it here. Upon receiving the referral, this court ordered plaintiffs to submit their proposed order. Order for Submissions (Jan. 3, 1989). The proposed order is, therefore, treated as a motion for preliminary injunction.

constitutional claims for lack of state action and for summary judgment on plaintiffs' fair representation claim. General Dynamics also moved to dismiss for lack of jurisdiction and/or failure to state a claim. These motions are resolved below.

A. Preliminary Injunction

Plaintiffs have moved to enjoin defendants from exacting monies or fees in excess of those necessary for collective bargaining, contract administration and grievance adjustment, and to prevent defendants from discharging any plaintiff who refuses at this time to pay such fees. Plaintiffs assert that until adequate procedures determine their correct pro-rata share of Union collective bargaining expenses, any fee collected will irreparably impinge upon their first amendment rights and violate the Union's duty of fair representation.

It is axiomatic that "injunctive relief clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979). Plaintiffs fail to meet either of these requirements and their motion for preliminary injunction is, therefore, denied.

Plaintiffs' allegations of irreparable harm are inextricably tied to their first amendment claims. There is no question that "loss of First Amendment freedoms, for even minimal periods of time, . . . constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accord *Katz v. McAulay*, 438 F.2d 1058, 1060 n.3 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) ("[I]rreparable harm is manifest where it is alleged that First Amendment rights have been chilled as the result of governmental action."). However, absent governmental involvement sufficient to implicate first amendment concerns, it is equally clear that mere monetary losses do not constitute irreparable injury. *Jackson Dairy, Inc.*, 596 F.2d

at 72. Thus, plaintiffs' claimed injuries, which constitute simple overcharging by the Union coupled with an overlay of alleged first amendment infringements, is only irreparable to the extent that first amendment rights are involved.[5] That involvement in turn hinges upon the existence of state action. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

1. State Action

Both Judge Blumenfeld, 621 F. Supp. 1243, and the Second Circuit, 795 F.2d 1128, have previously determined, in well-crafted and thorough opinions, that state action is not implicated in the agency shop agreements at issue here. Similarly, five of the seven judges of the Fourth Circuit who considered the issue reached the same conclusion, *Beck*, 800 F.2d at 1282, as did the District Court for the District of Columbia in a post-*Beck* opinion. *Abrams v. Communication Workers of America*, 702 F.

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[5]Plaintiffs also argue that they will suffer irreparable harm through discharge if they refuse to pay Union assessed fees, which they claim are excessive. However, plaintiffs can avoid discharge by temporarily suffering the readily recompensable loss of modest dues monies until their claims are resolved, when improper payments will be restored. In the absence of first amendment rights, it is difficult to comprehend why a plaintiff would challenge the Union assessment in such a way as to lose all income (i.e., refuse to pay and suffer discharge) rather than by paying the modest dues and seeking reimbursement of any overcharges, with interest. Furthermore, it is doubtful whether plaintiffs would be within their rights to refuse all payments, given this court's conclusion that the Union's procedures for determining the appropriate assessment do not violate the Union's duty of fair representation. *See infra*. In any event, "the temporary loss of income [resulting from discharge], ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). "'The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'" *Id.*, quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, any harm resulting from improper discharge would clearly be monetarily compensable, precluding injunctive relief.

Supp. 920 (D.D.C. 1988). It is true, as plaintiffs argue, that the Second Circuit's controlling opinion was vacated after the ruling in *Beck*; however, the "state action" reasoning of the Second Circuit opinion was not altered or disturbed.

In *Beck*, the Supreme Court explicitly declined to rule on the state action issue, id. at 2656,[6] resolving the case instead on purely statutory grounds and reversing the Second Circuit on its interpretation of Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3). Consequently, there has been no modification of the Second Circuit's determination that the agency shop agreement here is "a product of private negotiations and [is] not attributable to the government." 795 F.2d at 1133. That conclusion and the analysis used to reach it are found to be sound and persuasive. Rather than reiterate that analysis, that part of the Second Circuit's opinion which discusses the lack of state action, 795 F.2d at 1132-33, is incorporated herein. Plaintiffs' constitutional claims must, therefore, fail for want of governmental involvement.[7] Accordingly, plaintiffs fail to sustain

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[6] Interestingly, however, in declining to comment on the constitutional issue, the Court cited only two precedents, both of which involved union activities which were found not to implicate governmental action; *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982) (union's decision to adopt an internal rule governing its elections does not involve state action); *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (negotiation of collective bargaining agreement's affirmative action plan does not involve state action). These citations would appear to lend the Court's imprimatur to the conclusion that state action is not implicated in this case.

[7] Briefly, the rationale for lack of state action is as follows: State action requires (1) exercise of a right or privilege created by the government; (2) by a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Although the language at issue here, Section 8(a)(3) of the NLRA (defining unfair labor practices), is nearly identical to the language of Section 2, Eleventh of the Railway Labor Act ("RLA"), and Section 2, Eleventh has been found to implicate state action, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1956), the finding of state action under Section 2, Eleventh rested squarely on

their burden of demonstrating irreparable injury and their motion for preliminary injunction must be denied.[8]

B. Union's Motion to Dismiss

The Union's motion to dismiss plaintiffs' first and fifth amendment claims is granted, given the absence of state action to support those claims. Counts One, Two and Three of plaintiffs' amended complaint are, therefore, dismissed.

C. Union's Motion for Summary Judgment

Defendant Union has moved for summary judgment on plaintiffs' fourth count, which alleges that the Union has violated its duty of fair representation by demanding "the full amount of fees and/or dues" charged to Union members, in excess of the amount "reasonably necessary and germane to collective bargaining, contract administration and grievance adjustment." Amended Complaint, para. 21. The Union argues that, since *Beck*—which established the validity of this particular claim—it has reduced the agency fees charged non-Union members to 85.4% of the full fees (allegedly representing the percentage of Union dues attributable to collective bargaining activities) and instituted

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the fact that the RLA expressly preempts contrary state law, *id.*, thereby providing "the source of the power and authority by which any private rights are lost or sacrificed." *Id.* By contrast, the NLRA expressly allows for contrary state law, see 29 U.S.C. § 164(b), and, therefore, does not authorize or provide for the deprivation of any right or privilege created by the government. In short, the lack of preemption under the NLRA negates a finding of government infringement of constitutional rights. Furthermore, the Union and employer here cannot be said to be state actors. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Sadlowski*, 457 U.S. at 121, n.16; *Weber*, 443 U.S. at 200.

[8] Similarly, given the conclusion, *infra*, that the Union is entitled to summary judgment on its duty of fair representation claim, and that the claims against General Dynamics should be dismissed, plaintiffs are not "likely to succeed on the merits", an additional basis for denying the preliminary injunction.

supplemental procedures by which objecting employees can impartially challenge the Union's determination of this percentage.[9] Plaintiffs' opposition criticizes both the accuracy of the Union's accounting methods and the adequacy of the objection procedures.

The Union's duty of fair representation arises from Sections 8(b) and 9(a) of the NLRA, 29 U.S.C. §§ 158(b), 159(a); although it is a "judicially implied duty," *Beck*, 108 S. Ct. at 2647, it "derive[s] from a union's statutory right to be the exclusive representative of the members of a designated unit." *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970), *cert. denied*, *Steelworkers v. Abrams*, 401 U.S. 1009 (1971). Under the duty, a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration and enforcement of collective-bargaining agreements." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979). It is well established that the duty is breached "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

Plaintiffs' claims of unfair representation cannot presently be sustained. Since *Beck*, the Union has not acted arbitrarily, discriminatorily or in bad faith. To the contrary, the Union has determined, at least preliminarily, the percentage of costs attributable to collective bargaining activities (85.4%) and adjusted plaintiffs' assessed fees accordingly. The Union has also placed a sum representing the entire projected 85.4% reduced payments of all non-Union plaintiffs for the twelve-month period following *Beck* in an interest bearing escrow account. These monies will not be used by the Union until an independent arbitrator has reviewed the Union's percentage determination.

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[9] These procedures are memorialized in a letter from the Union to plaintiffs' counsel, dated October 11, 1988 (attached as an Appendix).

The Union's new objection procedures, which closely track guidelines established in a recent internal NLRB memorandum (Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck*, NLRB Office of the General Counsel, Nov. 15, 1988, Exhibit B to Plaintiffs' Reply to Defendants' Memorandum in Opposition to Motion for Preliminary Injunction) can be outlined as follows:

I. Report of Expenditures

On May 15 of each year, following the year-end audit, the Union will issue a Report of Expenditures Incurred in Providing Collective Bargaining Services (the "Report") which will indicate (1) the percentage of funds spent in the last accounting year for representational (chargeable) and non-representational (non-chargeable) activities; and (2) the major categories of expenditures and their allocation by the Union as either chargeable or non-chargeable.

This Report shall be mailed to all employees who have objected to payment of these fees within the past twelve months, and all subsequent objectors.

II. Challenges

Within forty-five days of issuance of the Report any non-Union employee can challenge the Report and the chargeable percentage by informing the Union in writing. Such objections must be renewed annually.[10]

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[10] [D]issent is not to be presumed—it must affirmatively be made known to the Union by the dissenting employee. The Union receiving money exacted from an employee under a Union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961).

III. Escrow Pending Resolution

Pending resolution of the objectors' challenges, the Union will place in an interest bearing escrow account a sum equal to each objector's projected payment for the subsequent twelve-month period to which the new percentage applies.

IV. Resolution by Binding Arbitration

All challenges to the chargeable percentage will be referred to the American Arbitration Association ("AAA") for resolution pursuant to its "Rules for Impartial Determination of Union Fees." Under those rules, AAA will select an arbitrator to hear and determine the validity of the challenges. The Union will bear the burden of justifying whatever fees are being disputed. The arbitrator's binding decision is to be issued expeditiously -- within sixty days of consolidation of the challenges for hearing.

Plaintiffs' objections to these procedures are based primarily upon cases which impose constitutional requirements on Union fee collection practices.[11] *See, e.g., Chicago Teachers Union*, 475 U.S. 292; *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306 (W.D. Mich. 1986). However, given the lack of state action, this case is not governed by constitutional standards. Rather, the Union's conduct is to be reviewed simply to determine if it is arbitrary, discriminatory or in bad faith. *Sipes*, 383 U.S. at 190.

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[11] These Constitutional requirements include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow of the amounts reasonably in dispute while such challenges are pending." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). Notably, the Union's procedures approach these standards to a significant degree.

Plaintiffs object (1) that the Union's annual expenditure Report is not sufficiently detailed to provide for an informed objection; (2) that the determination of chargeable and non-chargeable Union expenditures should be made by an independent auditor (rather than by the Union); (3) that the "local presumption"[12] assumed by the Union in calculating the chargeable percentage is inaccurate and unsupported; and (4) that the requirement of binding arbitration is unconstitutional.

(1) Detail of the Report

Plaintiffs' argument that the Report is insufficiently detailed is based upon *Hudson*, where the Court required out of "concern for the First Amendment rights at stake, . . . that the potential objectors be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. However, *Hudson's* first amendment principles do not control the instant case. Viewing the Union expenditure Report under the *Sipes* standard, it plainly is not arbitrary, discriminatory or in bad faith and, notably, plaintiffs have not alleged it to be so. Accordingly, the court finds the Report adequate for purposes of providing potential objectors an informed basis on which to object.

(2) Auditing of Chargeable and Non-Chargeable Expenditures

Plaintiffs' argument that an independent auditor should evaluate and determine chargeable and non-chargeable expenditures is also based upon plaintiffs' interpretation of first amendment requirements, as imposed in *Hudson*, *Tierney*, and *Damiano*. Even if this case were governed by the more stringent constitutional standards, plaintiffs' argument would fail. As the Second

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[12] The Union has assumed for practical accounting purposes that the allocation between chargeable and non-chargeable expenditures for the International Union (UAW) is equivalent to the allocation for each of its 1189 Local unions. This is the so-called local presumption.

Circuit has stated, in a nearly identical context with a nearly identical union procedure:

> *Hudson's* auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses. The union's plan satisfies this requirement. The [plaintiffs'] interpretation of *Hudson's* auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses.

Andrews v. Education Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987). Significantly, *Andrews* involved first amendment rights and thus was judged under a stricter standard than that which is involved here. Accordingly, the Union's auditing procedures cannot be said to violate plaintiffs' rights.

(3) Local Presumption

Plaintiffs assert that the Union's use of the local presumption to determine the chargeable percentage is unsupported and, therefore, cannot pass constitutional muster. Contrary to plaintiffs' claims, however, there are no fundamental constitutional rights at issue here, so the Union's procedure need not "withstand strict scrutiny." Plaintiffs' Opposition to Defendants' Motions to Dismiss and or for Summary Judgment at 8. Even under a constitutional analysis, however, at least one court in this district has previously approved just the sort of local presumption presented. "[T]he Supreme Court [has] repeatedly recogni[zed] that 'there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required."'" *Andrews*, 653 F. Supp. 1373, 1378 (D.Conn. 1987), quoting *Hudson*, 475 U.S. at 307 n.18. Accordingly, "defendants' use of the evidentiary presumption . . . satisfies constitutional

requirements, even if in rare instances there may arise situations in which this presumption is incorrect." *Id.*

In the instant case, the Union's use of the presumption is clearly not arbitrary, discriminatory or in bad faith, especially considering the fact that plaintiffs are not required to blindly accept this presumption, but may challenge it in arbitration together with any other challenges to the Union's chargeable fee determination. The Union will bear the burden of justifying the presumption at such a proceeding. The presumption is clearly within the "wide range of reasonableness . . . allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). Accordingly, the Union's use of the local presumption is proper.

(4) Binding Arbitration

Plaintiffs' argument that the Union's procedure calling for binding arbitration is unconstitutional does not require discussion; it is without merit.

The Union's procedures for determining the correct chargeable fee for non-Union employees, instituted in the aftermath of *Beck*, clearly satisfy the Union's duty of fair representation. Accordingly, the Union is entitled to summary judgment on plaintiffs' fourth count, at least to the extent that it seeks redress for post-*Beck* violations. An issue remains as to pre-*Beck* violations, however, and the potentially retroactive reach of *Beck*. The Union claims that *Beck* cannot be applied retroactively; plaintiffs have not discussed this issue. In order to address the issue fairly, the parties are ordered to submit briefs, on or before June 19, 1989, discussing the retroactive effect of *Beck* and the appropriateness of a remedy for pre-*Beck* violations.

D. General Dynamics' Motion to Dismiss

It is well established that an employer can be held responsible for violating the NLRA when it "participates" with a union

in arbitrary or unfair activity. *Sipes*, 386 U.S. at 178. However, given the determination above that there has been no unfairness on the part of the Union, at least post-*Beck*, the employer's motion to dismiss shall be granted as to any post-*Beck* claim. Resolution of plaintiffs' potential pre-*Beck* claims against General Dynamics must await this court's determination of the retroactive effect of *Beck*.

Conclusion

For the foregoing reasons, plaintiffs' motion for a preliminary injunction is denied, defendant Union's motion to dismiss is granted, defendant Union's motion for summary judgment is granted as to any alleged post-*Beck* violations, and defendant General Dynamics' motion to dismiss is granted as to any alleged post-*Beck* violations.

SO ORDERED.

Dated at Hartford, Connecticut, this 31st day of May, 1989.

/S/
Peter C. Dorsey
United States District Judge

APPENDIX

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA -- UAW

October 21, 1988

Michael Avakian
Center on National Labor Policy
5211 Port Royal Road
Suite 400
No. Springfield, Virginia 22151

Re: *Price v. UAW*
(Civil No. H84-1221 (D.Conn.) (2d Cir. No. 85-7408))

Dear Mr. Avakian:

This letter is to inform you, and through you your non-UAW member clients who are plaintiffs in the above-referenced matter, that the UAW has determined to adopt the procedures described herein regarding objections by non-members of the UAW covered by union security agreements negotiated under the National Labor Relations Act ("NLRA") to expenditures not related to collective bargaining and related union activities. UAW Local 571's records indicate that of your 252 clients, 123 have left the bargaining unit, 10 have joined the UAW, and at least one, Mr. Price, is on leave of absence.

Part of UAW's procedure is that nonmembers of the UAW covered by NLRA union security agreements negotiated under the NLRA are required to notify the UAW in writing of their objection by writing to the Agency Fee Payer Objection Administration--Private Sector, International Union, UAW 8000 E. Jefferson Avenue, Detroit, Michigan 48212. Objections must be

renewed each year. (This procedure is separate from the procedure set out in Article 16, Section 7 of the UAW Constitution. Unlike the procedures described herein, which are available only to objecting non-members covered by NLRA union security agreements, the Article 16, Section 7 procedure is available to all your clients, including those who have chosen to become members of the UAW.)

However, in light of your clients' participation in the above-referenced case, the UAW has decided, for this case only, to treat each of your non-member clients as objectors, under the procedure outlined herein, without requiring them to submit individual objections. The only exception is that this treatment would not apply to the ten of your clients who have joined the UAW since commencement of this case in 1984. In order for your non-member clients to renew their objections and continue them in force without interruption they should notify the UAW at the above address within thirty days prior to October 21, 1989.

We are notifying your non-member clients' employer to immediately reduce the amount of fees paid by your clients pursuant to any check-off authorization to 85.4 per cent of the dues paid by union members in your bargaining unit. If your non-member clients do not pay by check-off, they should begin paying this same reduced percentage of fees directly to the Union. A copy of our letter to the employer is enclosed.

This percentage referred to above (the "Chargeable Amount") is determined pursuant to the enclosed Report of Expenditures Incurred In Providing Collective Bargaining Related Services. The Report sets forth the UAW's allocation of various major categories of expenditures as chargeable or non-chargeable. The amounts listed in the Report as having been spent in the major categories of expenditures set forth in the Report, but not the above-referenced allocation, are taken from the UAW's financial statements for Fiscal Year 1987 (calendar year 1987), which have been audited by Clarence H. Johnson Co., Certified Public Accountants. The allocation of categories of UAW

expenditures into chargeable and non-chargeable components was done by the UAW.

A new Report is to be issued May 15 of each year, following completion of the next such fiscal year-end audit, and the amount chargeable to objecting non-members will be redetermined at that time. It would be helpful if you could provide the UAW with the current addresses of your non-member clients who are currently employed in the bargaining unit. This new Report will be mailed to your non-member clients who continue to be employed in the UAW-Electric Boat bargaining unit at the time the new Report is issued.

Any challenges to the calculations in the Report or any challenge claiming that the Report does not properly determine what portion of UAW's expenditures were expended on matters unrelated to collective bargaining must be mailed to "Agency Fee Payer Objection Administration--Private Sector, International Union, UAW, 8000 East Jefferson, Detroit, Michigan 48214." Such challenges must be received between the May 15 issuance of the Report and the 30th day of June following the issuance of the Report. Since this period of time has passed, your clients' first opportunity to challenge a Report determination will be during the above-referenced period following the issuance of the next Report, (*i.e.*, May 15-June 30, 1989).

Any such challenges to a Report as described above will be referred to an impartial decisionmaker. Until further notice, all such appeals shall be referred by the UAW to the American Arbitration Association ("AAA"), pursuant to its "Rules for Impartial Determination of Union Fees effective June 1, 1986." (A copy is attached). The UAW will have the authority to have any or all such challenges consolidated before the impartial decisionmaker selected by the AAA. The impartial decision-maker shall issue his or her determination as to the challenges within 60 days of the filing of the last challenge so consolidated. the impartial decisionmaker's jurisdiction shall be limited to determining whether the Chargeable Amount determined by the

UAW with respect to the challenges is in accord with the standard set forth in the previous paragraph of this letter. The determination of the impartial decisionmaker shall be final and binding.

If your non-member clients file a timely challenge to a Report pursuant to the above-described procedure, the UAW will immediately deposit an amount of money equal to the amount to be charged to your non-member clients during the next twelve month period in an interest-bearing escrow account maintained by Comerica Bank. Money so deposited will remain in the escrow account and will not be made available to the UAW for any use until distribution in accordance with the determination of the impartial arbitrator.

Finally, to avoid litigation and given the fact that your clients have had the above-referenced civil action pending for some time, the UAW will take the additional steps set out below in this paragraph, without precedent for the future and in this case only. First, the UAW will escrow all agency fees paid by your non-member clients for the period from July 1, 1988 to June 30, 1989, and will refund to your clients any fees already paid in excess of the 85.4 per cent Chargeable Amount for that period. Second, the results of any arbitration decision which any of your non-member clients cause to be issued, by timely filing a challenge to the UAW's next such determination stated in its next Report, will be applied to these escrowed agency fees for the period from July 1, 1988 to June 30, 1989 for all of your non-member clients who have filed a challenge to the next Report determination.

Counsel for the UAW will contact you to attempt to resolve any claims made by your clients for the period prior to July 1, 1988.

Very truly yours,

Agency Fee Payer Objection
Administration-Private Sector
International Union, UAW
8000 East Jefferson
Detroit, Michigan 48214

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT PRICE, et al.	:	
-vs-	:	Civil No. H-84-1221 (PCD)
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al.	:	FILED JAN. 4, 1990

RULING AND ORDER

In the Ruling on Pending Motions dated May 31, 1989, this court ordered the parties to brief the retroactive effect of the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. __, 108 S. Ct. 2641 (1988), and the appropriateness of a remedy for pre-*Beck* violations. While retroactive application of judicial decisions is neither compelled nor prohibited by the Constitution, "the general rule is that Supreme Court decisions are given full retroactive application." *Barkman v. Wabash, Inc.*, 674 F. Supp. 623, 627 (N.D. Ill. 1987), citing *Solem v. Stumes*, 465 U.S. 638, 642 (1984). Accordingly, the party seeking prospective-only application bears the burden of showing that such limited application is justified. *See Saunders v. H.K. Porter Co.*, 643 F. Supp. 198, 201 (E.D. Va. 1986) ("strong presumption in favor of retroactivity cannot easily be overcome").

Defendant UAW contends that the *Beck* decision should not be applied retroactively under the principles established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[1] Plaintiffs assert that *Beck* itself demonstrates that it is to be applied retroactively and thus a *Chevron* analysis is inappropriate. Further, they argue that, even if such an analysis is appropriate, it would result in a finding of retroactivity.

Had the Supreme Court given no indication whether *Beck* should apply retroactively, a *Chevron* analysis would be necessary to resolve the issue. *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239, 241 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984). However, where an appellate court applies its decisions to the parties before it, but is silent as to whether the decision is to be given general retroactive effect, courts generally find further analysis of the retroactivity question to be unnecessary. *See, e.g., Smith v. General Motors Corp.*, 747 F.2d 372, 375 (6th Cir. 1984) (en banc).

The Court in *Beck* held that agency shop agreements were limited by the union's duty of fair representation to exacting from non-union member employees "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues' [, i.e.,] . . . those germane to collective bargaining, contract administration, and grievance adjustment." *Beck* 108 S. Ct. at 2657-58, quoting *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 488 (1984). While the Court did not expressly consider the issue of retroactivity, it did apply its holding to the claim in issue in the case before it, affirming the judgment of the Court of Appeals which provided, in part, that the "objecting employees are entitled to a refund of any amount collected of them by the union beyond" those found to be properly exactable from non-

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[1]Defendant General Dynamics did not file a brief on this issue because it felt that neither *Beck* nor its fair representation analysis relates to employer liability for alleged union violations of the duty of fair representation.

union members. *Beck v. Communication Workers of America*, 776 F.2d 1187, 1209 (4th Cir. 1985), *aff'd on reh'g en banc*, 800 F.2d 1280 (4th Cir. 1986). Where the Supreme Court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 797 (2d Cir. 1981). This court must defer to the Supreme Court's implicit directive on this issue. *Welyczko*, 733 F.2d at 241.

On June 30, 1988, the Supreme Court granted plaintiffs' petition for writ of certiorari and vacated the Second Circuit's opinion, *Price v. UAW*, 795 F.2d 1128 (2d Cir. 1986), and remanded for further consideration in light of *Beck*. *Price v. UAW*, 108 S. Ct. 2890 (1988). Implicitly, the Supreme Court remanded to apply *Beck* to past facts. Had the Court intended *Beck* to apply only to claims arising between the date of its ruling and the ultimate resolution of this action, it surely would have outlined this extraordinary limitation on the application of its ruling in its order of remand. In view of the implicit endorsement of retroactive application, an analysis under *Chevron* is not found to be appropriate. Accordingly, it is found that defendant UAW has not met its burden of showing that prospective relief is warranted and *Beck* will be applied to plaintiffs' duty of fair representation claim for the period between September 1984 and June 30, 1988. The next issue on which briefing was ordered is the appropriateness of a remedy for pre-*Beck* violations of the duty of fair representation. Plaintiffs request that this court order the equitable restitution, with interest, of all service fees deducted since September 1984, from plaintiffs' salaries. This court has previously ruled that plaintiffs' post-*Beck* claims of unfair representation cannot presently be sustained because the Union had adjusted plaintiffs' assessed fees to 85.4% of that of its members and placed such payments in an interest bearing escrow account until an independent arbitrator has reviewed the Union's preliminary percentage determination. *Price v. UAW*, 722 F. Supp. 933, 937-38 (D. Conn. 1989).

It is undisputed that, prior to *Beck*, plaintiffs paid their dues and initiation fees in compliance with the union security clause. Ruling on Pending Motions (4/11/85) at 2. Plaintiffs protested the payment of any amounts which the union will expend for purposes other than collective bargaining or contract administration. *Id.* The union, however, insisted that plaintiffs pay their dues and initiation fees in full, and threatened to seek discharge of any member of the bargaining unit who refuses to pay. *Id.* The union also informed plaintiffs of a procedure provided by the constitution of the International, which permits members to seek a rebate of that portion of their dues spent on political causes which one finds objectionable. *Id.* Accordingly, the expenditure of fees collected from plaintiffs, over their objections, for purposes unrelated to collective bargaining activities is a violation of the Union's duty of fair representation. *Beck*, 108 S. Ct. at 2657; 29 U.S.C. § 158(a)(3). As defendant UAW does not dispute that it collected fees from plaintiffs without discounting the amount for any percentage expended on matters unrelated to collective bargaining, contract adjustment, and grievance adjustment, summary judgment is granted for plaintiffs on count four with respect to pre-*Beck* violations.

Defendant UAW argues that plaintiffs are not entitled to complete restitution and, moreover, should not be awarded any relief with respect to their pre-*Beck* duty of fair representation claim. Plaintiffs contend that the remedy for failure to provide *Beck* protections prior to collection is for the defendants to refund the improper monies collected, with interest.[2]

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[2]The cases relied upon by plaintiffs for complete restitution involve the unconstitutionality of union fee collection practices and hold that "no union or employer may take any action to enforce a non-union member's duty to pay any dues" absent a constitiutionally adequate allocation procedure. *See, e.g., Tierney v. City of Toledo*, 824 F.2d 1497, 1504 (6th Cir. 1987). However, given this court's finding of a lack of state action, this case is not governed by constitutional standards but by the union's duty of fair representation. *Price*, 722 F. Supp. at 936.

Under the circumstances as presented, plaintiffs are only entitled to a refund of those amounts nonchargeable under *Beck* with interest. *Cf. Hudson v. Chicago Teachers Union, Local No. 1*, 117 F.R.D. 413, 415 n. 1 (N.D. Ill. 1987) (class members would not be entitled to complete restitution of all fees paid under unconstitutional procedure but could only recover that portion of his fees used to support political causes to which he objected); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1084 (N.D. Ohio 1986). Complete restitution of all fees would defeat the purpose of the fair share provisions under which plaintiffs pay dues and initiation fees, and allow the nonmember plaintiffs to receive the windfall of a "free ride" for the period in issue. *See Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1456, 1470 (N.D. Ohio 1988); *see also Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.). *cert. denied*, 110 S. Ct. 278 (1989) (where the union rendered benefits to nonmembers with a reasonable expectation of compensation under the collective bargaining agreement and federal labor law, union would have a valid claim of restitution itself if it were forced to turn over all fees paid).[3]

In claiming complete restitution, plaintiffs are in effect seeking punitive damages. *Gilpin*, 875 F.2d at 1315-16. However, the Supreme Court has held that the fundamental purpose of unfair representation suits is compensatory and declined to permit punitive damages in such suits. *Electrical Workers v Foust*, 442 U.S. 42 (1979). Plaintiffs have not shown that the union acted in such a way to warrant an award of punitive damages, especially in view of the uncertain state of the law before *Beck*. Further, the Second Circuit held that plaintiffs' conclusory claim of bad faith was undercut in part by the fact that the international union had established a procedure for refunding monies spent on primarily political causes. *Price*, 795 F.2d at 1136.

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[3]Plaintiffs assert that the "defendant unions may proceed in state court to collect any obligation [they] might owe them, just as they have done in the past." Plaintiffs' Brief (7/3/89) at 23 n. 7.

The final issue is the proper procedure for determining what proportion of the union's total expenditures were attributable to activities other than those properly chargeable to non-members under *Beck*. As both parties have made all or nothing arguments as to an appropriate remedy for pre-*Beck* violations (plaintiffs for complete restitution, defendant UAW for denial of any relief); neither party has addressed the issue of the calculation of the amounts improperly collected prior to *Beck*. Such relief would necessarily require a determination, for the period in issue, of what proportion of the union's total expenditures wee attributable to activities to activities other than collective bargaining, contract administration and grievance adjustment. *Beck v. Communication Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979). "The burden of proving such proportion rests upon the union, but '[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required.'" *Id.*, quoting *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). Accordingly, the parties are to submit briefs, on or before January 19, 1990, addressing the appropriate procedure for determining this proportion, including the propriety of a judgment ordering this issue to be submitted to an arbitrator under a procedure similar to that instituted by the union in response to *Beck* and found to satisfy the union's duty of fair representation. *Price*, 722 F. Supp. at 940.

The final outstanding issue is the role of defendant General Dynamics. Although General Dynamics concedes that under limited circumstances an employer can be held responsible for violating the NLRA when it "participates" with a union in arbitrary or unfair activity, *Vaca v. Sipes*, 386 U.S. 171, 178 (2967), it argues it is the breach of contract, not the fair representation claim, which lies against the employer. General Dynamics asserts that it did only what it was contractually obligated to do, *i.e.*, to enforce, against plaintiffs prior to *Beck*, payment of the full amount of dues assessed by the UAW. Plaintiffs argue that they have alleged a hybrid § 301/fair representation claim, a breach of contract claim against the employer coupled with a concurrent fair representation claim against the union. In support, plaintiffs

direct the court to ¶ 21 of their complaint as containing an allegation of breach of contract on behalf of General Dynamics. Plaintiffs' Opposition (3/29/89) at 33. However, this paragraph appears to allege only a breach of the union's duty of fair representation. Plaintiffs also argue that "it is the union which is the moving force behind the employer's contract breach and it is the union from whom plaintiffs seek" the essential relief as it holds and will continue to obtain plaintiffs' dues and will secure their discharge if the money is not paid. *Id.* at 34. Plaintiffs have not articulated how General Dyamics breached the collective bargaining agreement. Further, it does not appear that the employer would be necessary to provide the relief found to be appropriate under count four. Accordingly, plaintiffs shall also brief the issue of the relief sought against the employer and the basis therefor on or before January 19, 1990; General Dynamics shall respond on or before January 29, 1990.

SO ORDERED.

Dated at Hartford, Connecticut, this 4th day of January, 1990.

/s/
Peter C. Dorsey
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT PRICE, et al.	:	
-vs-	:	Civil No. H-84-1221 (PCD)
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al.	:	

RULING ON PENDING ISSUES

In the Ruling and Order dated January 4, 1990, this court ordered the parties to brief (1) the appropriate procedure for determining what proportion of the union's total expenditures were attributable to activities other than collective bargaining, contract administration and grievance adjustment and (2) the relief sought against their employer, General Dynamics.

Initially, defendant UAW raises a jurisdictional issue, that only two of the 252 plaintiffs properly appealed the judgment entered on April 17, 1985 and thus only those two are entitled to relief. Based on Rule 3(c), Fed. R. App. P., it claims that the notice of appeal only specified that the appeal was taken by two plaintiffs. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (the use of "et al." in the notice of appeal fails to provide sufficient notice of appeal).

The absurdity of this argument is evidenced by the Second Circuit's opinion and the nature of plaintiff's claims. The notice of appeal was captioned "Robert Price and Timothy Sullivan, et al., Plaintiffs" and noted that "[n]otice is hereby given that the

above named plaintiffs appeal to the Second Circuit from the Judgment entered in this action on April 17, 1985." The purpose of Rule 3(c) is to provide notice of the identity of the appellant(s) to the court and the appellee(s). *Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550, 552 (2d Cir. 1989). It is clear that all parties, and the Second circuit, had notice that all 252 plaintiffs had appealed. Defendant UAW has not previously raised this issue and both parties have litigated this case on the basis that it was remanded with respect to all 252 plaintiffs. The Second Circuit's opinion lists all 252 individuals as plaintiffs-appellants and notes that "[a]ppellants are employees of General Dynamics." Further, the case has not, either before this court or the Second Circuit, been litigated with respect to any particular individual but rather with respect to issues common to a class of employees. UAW's contention that this case is before the court only with respect to plaintiffs Price and Sullivan is without merit.

"As defendant UAW does not dispute that it collected fees from plaintiffs without discounting he amount for any percentage expended on matters unrelated to collective bargaining, contract administration, and grievance adjustment, summary judgment is granted for plaintiffs on count four with respect to pre-*Beck* violations." *Price v. UAW*, Civ. No. H-84-1221 (D. Conn. Jan. 4, 1990) Ruling and Order at 5. It was also found that "plaintiffs are . . . entitled to a refund of those amounts nonchargeable under *Beck* with interest" and that "[s]uch relief would necessarily require a determination, for the period in issue, of what proportion of the union's total expenditures were attributable to activities other than collective bargaining, contract administration and grievance adjustment." *Id.* at 6-7. The parties have not briefed the issue of an "appropriate procedure for determining this proportion, including the propriety of a judgment ordering the issue to be submitted to an arbitrator under a procedure similar to that instituted by the union in response to *Beck* and found to satisfy the union's duty of fair representation. *Price*, 722 F. Supp. at 940." *Id.* at 8.

Plaintiffs strenuously object to a judgment submitting the issue of damages to an arbitrator and contend that they are entitled to a hearing on damages by this court. They assert that under the circumstances, this court may not enter such a judgment absent agreement. Plaintiffs argue that the AAA procedure found to satisfy the union's duty of fair representation under *Beck* is "rigged with union-dominated 'arbitrators' and pro-union procedures." Plaintiffs' Brief at 2.

Defendant UAW suggests the following procedure: (1) each plaintiff be given a copy of UAW's next Fee Report, to be issued in May, 1990; (2) that the reduced fee amount determined therein be applied to the pre-*Beck* period and that restitution, with interest, be remitted to plaintiffs; and (3) that each plaintiff have the right to challenge this proportion before an impartial arbitrator under the AAA's "Rules for Impartial Determination of Union Fees." It contends that this represents a fair procedure through which to measure plaintiffs' restitution and provides them with the opportunity to present any challenges to the arbitrator. Further, it argues that an examination of UAW's 1984 through 1988 expenditures would be burdensome and not worth the price of obtaining supposedly greater precision.

Defendant UAW's proposal does not comport with federal law and fails to taken into account that "[t]he burden of proving [what proportion of the union's total expenditures were attributable to activities other than collective bargaining, contract administration and grievance adjustment] rests upon the *union*, but '[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required.'" *Beck v. Communications Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979), quoting *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963) (emphasis added). Its suggestion bases calculation of the initial refund on an unrelated period, without any consideration of the proportion of total expenditures for the relevant period which were attributable to activities other than those properly chargeable to non-members under *Beck*, and then improperly foists the burden onto the individual plaintiffs to challenge the

amount. *See Beck v. Communications Workers of America*, 77(
F.2d 1187, 1209 (4th Cir. 1985) (burden of proof in establishin(
valid charges to objecting employees rests on defendant unions)
Although the procedure proffered by defendant UAW satisfies it
duty of fair representation, it was not in place prior to *Beck*. I
is undisputed that defendant UAW collected fees from plaintiff
without discounting the amount by any percentage expended o
matters unrelated to collective bargaining, contract administratio
and grievance adjustment in violation of its duty of fair represen
tation. *See* Ruling and Order (Jan. 4, 1990) at 5 (summar
judgment granted for plaintiffs on count four with respect to pre
Beck violations). Plaintiffs are thus entitled to a hearing, unde
the standards and burden noted above, on the issue of damages
i.e., to determine plaintiffs' refund of those amounts noncharge
able under *Beck* with interest. *See Beck*, 468 F. Supp. at 9
(district court referred issued to special master to make recom
mended findings of fact with respect to the apportionment o
costs). The parties shall prepare, on or before June 15, 1990
pre-hearing memoranda containing the following information:

1. A list of all witnesses expected to testify with a brief summary of their anticipated testimony. Witnesses not listed shall not be permitted to testify other than for good cause shown and arising at trial, in response to the case in chief or to the case in defense, and not reasonably anticipated at the filing of this memorandum.

2. A list of proposed exhibits, plaintiffs' numbered - defendants' lettered, with a brief description of each. Exhibits not listed shall not be admitted other than for good cause shown and arising at trial, in response to the case in chief or to the case in defense, and not reasonably anticipated at the filing of this memorandum.

3. Plaintiffs shall provide a list of each plaintiff's individual claim of entitlement to a refund, with a description of the method used to calculate such amounts.

4. Counsel shall set forth a realistic estimate of hearing days required.

Finally the parties were ordered to brief the relief sought against their employer, General Dynamics ("GD"), and the basis therefor. Plaintiffs argue that they have asserted a breach of contract claim against GD coupled with a concurrent fair representation claim against the UAW. Specifically, plaintiffs contend that the statutory duty of fair representation prohibits the collection of fees that are not germane to representational activities and that this limitation is an implied term of the collective bargaining agreement. They assert that GD is jointly liable because it wilfully violated this duty and assisted in collection of such amounts in violation of federal law.

GD contends that it only did what it was contractually obligated to do, *i.e.*, to enforce, against plaintiffs prior to *Beck*, payment of the full amount of dues assessed by the UAW. GD argues that it had not indication prior to *Beck* that collection was unlawful. In fact, prior to the Supreme Court's opinion in *Beck*, both this court and the Second Circuit concluded that plaintiffs had failed to establish that the union had breached its duty of fair representation and dismissed as to GD. Plaintiffs have alleged nothing from which to conclude that GD "participate[d]" with the union in arbitrary or unfair activity, *see Vaca v. Sipes*, 386 U.S. 171, 178 (1967), nor to find that GD breached the collective bargaining agreement. GD merely acted as a conduit through which the union dues were collected by UAW. GD neither expended the funds nor did it join the expenditure determination from which plaintiffs' entitlement to a refund arises. Plaintiffs are entitled to a refund, with interest, of dues expended on matters not germane to collective bargaining under *Beck*. Plaintiffs have not shown that GD possesses such funds nor that it should be held jointly liable for their return. Accordingly, the complaint is dismissed with prejudice as to GD.

SO ORDERED.

Dated at Hartford, Connecticut, this 2nd day of May, 199

/s/
Peter C. Dorsey
United States District Judge

Nos. 89-1885/89-2077

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA CRAMER; JAMES J. ACHTERHOF; JAMES P. BEBERMEYER; GARY W. BLEYER; LENSOWRTH COTTRELL, JR.; JAMES E. CROWLEY; ALAN P. DAMIANO; LAURA DANIEL; MARLENE A. EPLEY; MARTA S. GOFF; LLOYD R. HAGAN; VICKI PETERS; DEBORAH L.ROESKI; AL ROLLINS; JAMES E. SCHMID; LARRY SUTTER,

Plaintiffs-Appellants,

v.

GEORGE G. MATISH, Director, et al, (Class Action); INTERNATIONAL UNION, Michigan UAW; UAW, LOCAL 600,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan

November 2, 1990, Filed*

Before: MARTIN and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge. WELLFORD, Circuit, concurring.

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*NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

PER CURIAM: Plaintiffs, a class of Michigan state employees within the Michigan Human and Administrative Support bargaining units who have not signed an authorization for deduction of union representative service fees, appeal the district court's dissolution of a preliminary injunction preventing the automatic deduction of union agency shop fees from non-union employees' wages, the district court's denial of their claims for restitution, and the district court's denial of their request for class certification.

Plaintiffs brought this action seeking to enjoin the automatic deduction of union representation service fees from their wages under the 1988-90 collective bargaining agreement between the State of Michigan and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 6000-UAW. This is the second such action involving these groups. In the first, we held that the union's automatic deduction program failed to meet the requirements announced in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). *See Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). After that decision, the union and the state revised their collective bargaining agreement to comply with *Hudson*.

Under the 1988-90 collective bargaining agreement at issue in this case, a service fee was automatically deducted from plaintiffs', and other proposed class members', wages from July 1, 1988 through June 30, 1989 in the amount of 87.3% of the full union dues for union members. Plaintiffs sought to enjoin the union from collecting any fair share deductions from non-union members, claiming that the union's new Agency Fee Payer Objection Policy, which allows for the automatic deduction of non-members' proportion of chargeable representation service fees, again failed to meet the constitutional requirements set forth in *Chicago Teacher Union v. Hudson*, 475 U.S. 292 (1986), *Tierney v. Toledo*, 824 F.2d 1497, 1502 (6th Cir. 1987), and *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). Consequently, the plaintiffs argued that non-members were not obligated to pay any service fees.

The district court granted a temporary restraining order on October 7, 1988, and, after hearing oral arguments, granted a preliminary injunction on October 28, 1988. In an Opinion and Order dated November 15, 1988, the district court found that the union's new policy was sufficient under *Hudson* in all respects except that it did not ensure that the presumption that the local union spent more of its time in chargeable collective bargaining activities than the international union, whose percentage of chargeable activity was used to set the 87.3% fair share deduction, was reliable as applied to Local 6000. The district court concluded that the international union was responsible for having a procedure that would provide a potential objector with information regarding the expenditures of his local union, or, if the fair share deduction was based on the local presumption, that the local presumption had a basis in fact. Thus, the district court required the international union to present evidence that the local presumption had a basis in fact for the present year and to provide a method whereby potential objectors would have assurance in ensuing years that the local presumption would have continued reliability. The district court continued the preliminary injunction.

The international union subsequently provided evidence to the district court that the local presumption had a basis in fact. In addition, the international union proposed to send an annual disclosure of Local 6000's expenditures along with the Agency Fee Objection Policy to provide potential objectors with the necessary information.

Since the union complied with the district court's mandate by providing a method by which potential objectors could evaluate the local presumption's reliability in ensuing years, the district court held that the union's plan met the constitutional requirements set forth in *Hudson*. Consequently on July 5, 1989, the district court granted defendants' motion for summary judgment, and denied plaintiffs' motion for summary judgment, reserving for further consideration plaintiffs' claims for restitution and their

motion for class certification, and ordering that the preliminary injunction would expire on August 14, 1989.

In considering the plaintiffs' claims for restitution of the past service fees and plaintiffs' motion for class certification, the district court reasoned that a union is entitled to charge non-members their pro rata share of the expenses incurred in negotiating and administering a collective bargaining agreement. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1971). The district court stated that in order to remedy a deficiency in the union's policy, plaintiffs would be entitled to restitution of paid fees which were in fact unwarranted. That is, only the amounts paid in excess of chargeable amounts.

Since the UAW originally deducted only 87.3% of the full UAW fees and since the UAW' provided evidence to the district court that the percentage deducted was appropriate, the district court found that, having paid only their appropriate pro rata share, the plaintiffs were not damaged and were not entitled to any restitution award. The district court noted that under these circumstances, any award would be a windfall to the non-members who have been recipients of benefits provided by chargeable services. Further, the district court held that no persuasive evidence demonstrated how the plaintiffs were injured by paying only their pro rata share of chargeable expenditures. In this case, there was no harm to be compensated.

Based on its conclusions that no additional restitution was appropriate, the district court held that plaintiffs' motion to certify a class was rendered moot. Plaintiffs now appeal those rulings.

The plaintiffs contend that the district court erred in holding that an independent audit of the union's basic financial statement, but not its calculations and allocation of expenditures as chargeable or nonchargeable, was sufficient under *Hudson, Tierney,*

Damiano, and *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989).

In *Gwirtz*, we held that:

> a union must adequately explain the basis for a fair share fee and that "adequate financial disclosure would include the major categories of expenses and verification by an independent auditor.

Gwirtz, 887 F.2d at 681. As to verification, we specifically held that an auditor is not to make legal determinations such as whether a charge falls into the category of chargeable or non-chargeable. Rather, we held that an auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses. 887 F.2d at 682 n.3. We rejected the claim that *Hudson* requires a union to give the most detailed financial information, holding that *Hudson* mandates only the disclosure of "adequate" or sufficient information so that nonmembers, such as the plaintiffs, may "gauge the propriety of the union's fee." *Id.* at 682 (citing *Hudson*, 475 U.S. at 306).

Under the standards for gauging the adequacy of an audit recognized in *Gwirtz*, we reject the plaintiffs' contentions that auditors, by reason of an ability to assess chargeability of expenses, may do so. That is a legal determination. We also reject plaintiffs' contention that because *Gwirtz* dealt with an audited basic financial statement plus a supplemental audited statement, that more than a basic financial statement is required under *Hudson*. *Gwirtz* makes it clear that all that is required under *Hudson* is a disclosure revealing the major categories of expenses and an auditor's verification that the expenditures claimed by the union were actually made for those expenses. *See Lehnert v. Ferris Faculty Ass'n-MSA-NSA*, 893 F.2d 111, 112 (6th Cir. 1989) (reaffirming *Gwirtz*). Having said that, we must remand because it is unclear that the district court took the *Gwirtz* requirements into account when it rendered its decision on this issue.

The plaintiffs next contend that the union's use of a "local presumption" instead of providing audited statements of the local's allocated chargeable and nonchargeable expenses does not comply with *Hudson*. The district court initially rejected the union's reliance on the presumption that local union's engage in more chargeable collective bargaining expenditures than the international union. The district court then allowed the union to develop a plan which will annually provide nonmembers with information ensuring the reliability of the local presumption Then, because of supplemental information, but not an audit, regarding local expenditures, the district court determined that *Hudson* was satisfied. That supplemental information was only to the establishment that local unions spend more of their time on chargeable activities than international unions——that the local presumption has an "established basis in fact."

The plaintiffs argue that this local presumption violates *Tierney's* construction of *Hudson* where the court held that the [*Hudson*] disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes." *Tierney*, 824 F.2d at 1503 (citing *Hudson*, 106 S.Ct. at 1076 n.18.). They argue that using a local presumption does not provide potential objectors with the information to which they are entitled under *Hudson*. We agree.

In *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir. 1990) (*Lowary II*), the Court held that the local presumption employed by the union was unconstitutional. The Court recognized the argument, also tendered by the union in this case, that "because the [international] union spends a greater percentage on nonchargeable expenditures than do the local [unions], any error in the precision of the presumption actually operates in favor of the nonmember payors." *Lowary*, 903 F.2d at 431.

In *Lowary*, the union failed to provide any empirical evidence that supported the premise that the state or international union spends a greater percentage on nonchargeable

expenditures than the local unions. *Id.* Here, empirical information was provided by the union to support the local presumption. Nevertheless, we hold that as a matter of law, local presumptions circumvent *Hudson's* disclosure requirements and "increase[]the risk that the reduced fee collection from the objector would be in excess of what is appropriate. The presumption impermissibly shifts the burden of persuasion in arbitration. The nonmember's burden is simply to make his objection known." *Id.* at 431 (Citations and quotations omitted). Thus, we reverse the district court's determination that the union's use of a local presumption, even when augmented by some empirical evidence, met *Hudson's* disclosure requirements. We note that the union's point that the result of required independent audits at local unions will result in higher chargeable costs to nonmembers is no doubt true, but that is a decision for nonmembers to make. The use of a presumption does not meet our holding in *Tierney* that a "[*Hudson*] disclosure must include an audited detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and nonagreement related purposes." 824 F.2d at 1503. As *Lowery* recognized, without an independent audit of the local union, unions may "avoid providing audited and detailed financial statements to nonmembers concerning the local and district union affiliates in violation of *Hudson*." 903 F.2d at 431. While providing that information may be burdensome, "excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson's* requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Id.* at 431-32.

The plaintiffs contend that the statement in the union's policy that arbitration shall be final and binding on objectors is unenforceable and should be removed from the policy. They state that since the district court noted that this limitation of objectors rights to bring § 1983 actions is prohibited, it was wrong to allow this statement to remain in the policy.

The plaintiffs assert that while the language is unenforceable, it will mislead average objectors to conclude that they may not go to court to assert denials of their first amendment rights after arbitration. They also assert that the clause indemnifying the state for constitutional violations is void because it is against public policy for the state to shirk its responsibilities. Under *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1449 (N.D. Ohio 1987), reversed on other grounds, 854 F.2d 131 (6th Cir. 1988). Indemnification clauses in collective bargaining agreements which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy. *Stamford Bd. of Educ. v. Stamford Educ, Ass'n.*, 697 F.2d 70, 73-75 (2d Cir. 1982). Without such a role, public employers would have no incentive to fulfill their constitutional duties. They assert that the district court's reluctance to modify a substantive term of the collective bargaining contract is unsound. It is not a modification, rather, it is a voiding of the provision.

We agree and upon remand, the district court is instructed to strike these misleading and void provisions from the policy.

Plaintiffs further assert that they are entitled to a complete refund of their total fees deducted from their wages when the *Hudson* procedural safeguards were not in effect. *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir. 1988) (*Lowary I*). The district court held that they were entitled only to a return of the amount paid in excess of the nonchargeable amounts.

In *Lowary (II)*, this Circuit dismissed the plaintiffs' reading of *Lowary (I)*, and held, consistent with the district court's reasoning here, that nonmembers are only entitled to reimbursement of the nonchargeable portion of unconstitutionally collected

fees. 903 F.2d at 432-33. Thus, we affirm the district court's decision on this issue.

We note that upon remand, the district court must consider the refund properly awarded to the nonmembers under the *Damiano* decision as well as under this decision. The groups may overlap or be quite distinct and the percentages of fair share deductions may be quite different under each contract.

We also note that because we have reversed the district court on the local presumption issue and there is a potential for reversal under *Gwirtz*, on remand, the district court should reissue an injunction against the collection of nonmembers' fair share deduction and the district court should reconsider its class action certification decision.

Thus, we reverse in part, affirm in part, and remand for further proceedings in light of our opinion

Nos. 89-1885/2077; *Cramer, et al. v. Matish, et al.*

WELLFORD, *Circuit Judge*, concurring.

To the extent this decision is deemed consistent with *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987) ("*Tierney II*"), I am in full accord. Another panel of this court very recently in "*Tierney III*", No. 88-4047, filed October ___, 1990, made the following observations concerning *Tierney II* and our prior decision in this case:

> In *Tierney II*, we concluded, among other things, that the 1983 plan proffered by TPPA "contain[ed] no provision complying with *Hudson's* requirements that detailed financial information concerning all major categories of union expenses, including those for payments made to affiliated unions, be audited by a certified public accountant independent of the union and provided to all non-members before any fees may

be collected from them." 824 F.2d at 1506. We also more fully discussed the necessary financial disclosure:

> *Hudson's* second requirement is that the union procedure must "provide[] non-members with []adequate information about the basis for the proportionate share." *Id.* In this regard the burden is upon the union to prove the proper proportion of union political expenses to total union expenditures. *Id.* To fulfill this burden, *Hudson* admonishes the union to give "*potential objectors* ... sufficient information to gauge the propriety of the union's fee," *id.* at 1076 (emphasis supplied), before it collects any fees from non-members.... The union's proportionate share figures for its "major categories of expenses, as well as verification by an independent auditor," must be disclosed to all non-members. *Id.* at 1076 n.18. Such disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes.

824 F.2d at 1503; *accord Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987). Further, the union must inform the non-members as to the amount of the service fee, as well as the method by which that fee was calculated. *Damiano*, 830 F.2d at 1370. "The union must therefore provide each non-union employee with adequate information in timely fashion to permit the member to enter an intelligent and informed objection to the use of his service fees if he desires." *Id.*

. . . .

> First, reference to the financial disclosure documents was necessary not only because the rebate procedure incorporates these documents, but also because these documents contain the methodology used to calculate the agency fee. More importantly, *Hudson* admonishes that a constitutional plan must contain adequate disclosure which "would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18; *see also Damiano*, 830 F.2d at 1370 ("the union must provide this information to each employee . . . to permit the employee to evaluate the calculation of the fees in order to make a reasonable appraisal of the fees preliminary to exercising the option to enter an objection to the union's decision"). These requirements are neither precatory nor self-enforcing.
>
> . . . . .
>
> Ensuring adequate disclosure to enable a nonmember to object, however, is materially different from determining whether particular expenditures are chargeable or whether the calculations and methodology therefore are acceptable. The latter questions, to be sure, are not presented at this stage of the review. As the officers acknowledge, these issues are for the arbitrator in the first instance once a non-member has objected to the propriety of the particular agency fee.

I am not sure that the auditors in this case, as in *Tierney*, fully indicated exactly what they did *actually* to *verify* the expenditures in question, nor precisely "what procedures were followed" to verify that purported expenses in a broad general category

were truly used in a proper chargeable context. (*Tierney III* at ___). For example, if the union claimed in its statements that travel expenses to a particular official to attend "a convention" were appropriately charged to plaintiffs, did the auditor verify whether the convention or related activities was political, ideological, or whether involved in collective bargaining, contract administration, or grievance adjustment process.

There is pending before the Supreme Court another challenge to chargeability determinations following grant of certiorari in a case decided by this court, *Lehnert v. Ferris Faculty Association*, 881 F.2d 1388 (6th Cir. 1989). It may be that the Supreme Court may shed further light on the issues which concern us here in respect to union expenses, if any, attendant to "public relations," conventions, lobbying, and providing services to other bargaining units. *See also Lehnert v. Ferris Faculty*, 893 F.2d 111 (6th Cir. 1989).

I state my continuing concern about the implications of *Gwirtz v. Ohio Educational Association*, 887 F.2d 678 (6th Cir. 1989) which seems inconsistent, not only with *Tierney* and other decisions in this circuit on what constitutes adequate and appropriate independent auditor verification, but also seems inconsistent with the Supreme Court requirements set out in *Chicago Teachers Union Local #1 v. Hudson*, 475 U.S. 292 (1986). *See Mitchell v. Los Angeles University School District*, 1990 W.L. 7728 (C.D. Calif. May 31, 1990). *Tierney III* correctly sets out that a parent or international union must disclose to the local union how it spends local funds before objections are made and arbitration is made available "Now members are constitutionally entitled to disclosure of these payments prior to objecting, so that they can evaluate the basis for an objection and consequently protect their First Amendment rights." *Tierney III* at ___. *Tierney III* also mandates that an exhaustion clause "unduly implies a limitation upon the officers' constitutional rights . . . the clause must be deleted." (*Tierney III* at ___).

I concur in the result reached here with these reservations.

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No. 90-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PRICE, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; AND MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes cited in the petition for *certiorari*, Pet. 2, § 14(b) of the National Labor Relations Act, as amended, was relied upon by the courts below in deciding the first question presented by the petition. That statute provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements re-

quiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. [29 U.S.C. § 164(b).]

STATEMENT OF THE CASE

1. The collective bargaining agreement between the Electric Boat Division of General Dynamics Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers and UAW Local 571 (hereafter "Union" or "UAW") requires all bargaining unit employees, as a condition of employment, to pay an amount equal to the initiation fees and dues required of Union members. Pet. App. 2a-3a. Prior to 1988, General Dynamics and the UAW required all bargaining unit employees to pay a uniform agency fee equal to normal Union dues, regardless of whether the employees were Union members and regardless of whether they objected to paying that amount. The petitioners filed this action, "contend[ing] that the payment of the full amount of dues and fees violated their First Amendment speech and associational rights and their Fifth Amendment due process rights, and, in addition, constituted a breach of the Union's duty of fair representation." Pet. App. 3a.

The district court (Blumenfeld, J.) initially dismissed the petitioners' constitutional claims on the grounds that General Dynamics and the UAW are not state actors subject to First and Fifth Amendment constraints. Pet. App. 3a. The district court also dismissed the petitioners' fair representation claims on the grounds that their dispute with the UAW involved internal union matters and thus did not implicate the duty of fair representation. Pet. App. 3a-4a. The Second Circuit (Cardamone, Pratt, & Miner, JJ.) affirmed the district court's rulings. *Price v. International Union, U.A.W.*, 795 F.2d 1128 (2d Cir. 1986), *vacated*, 487 U.S. 1229 (1988).

2. In *Communications Workers v. Beck*, 487 U.S. 735 (1988), this Court held that objecting nonmembers, who pay fees under an agency shop agreement, state a statutory claim for breach of the duty of fair representation by alleging that their union representative "expend[s] funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . ." *Id.* at 738. The Court thereupon vacated the decisions in this case, and remanded for further consideration in light of the *Beck* decision. *Price v. International Union, U.A.W.*, 487 U.S. 1229 (1988).

Shortly after this Court's decision in *Beck*, the UAW adopted procedures to reduce the amount of agency fees charged to objecting nonmembers. Pet. App. 29a-33a. While the district court held on remand that the Union's pre-Beck application of its agency shop agreement breached the duty of fair representation, Pet. App. 37a, the parties thereafter settled all claims arising on or before June 30, 1988 and stipulated to the dismissal of those claims. Dist. Ct. Docket Nr. 104. Thus, the proceedings at issue here focussed entirely on the adequacy of the objection procedures adopted by the UAW after this Court's decision in *Beck*. *See* Pet. App. 5a n. 1.

On remand, the district court (Dorsey, J.), Pet. App. 19a-20a, and the court of appeals (Oakes, Cardamone & Sprizzo, JJ), *id.* at 6a-7a, again dismissed the petitioners' constitutional claims for want of state action. In this regard, the courts below relied upon the analysis in the first court of appeals decision in this case. *Price v. International Union, U.A.W., supra*, 795 F.2d at 1132-1133.

The courts below also concluded that the "Plaintiffs' claims of unfair representation cannot presently be sustained." Pet. App. 22a. The lower courts based this conclusion on their finding that "[s]ince *Beck*, the Union has not acted arbitrarily, discriminatorily or in bad faith." Pet. App. 22a. *See also id.* at 8a. As the district

court noted, "the Union has determined, at least preliminarily, the percentage of costs attributable to collective bargaining activities (85.4%) and adjusted plaintiffs' assessed fees accordingly." Pet. App. 22a. In addition, "[t]he Union has also placed a sum representing the entire projected 85.4% reduced payments of all non-Union plaintiffs for the twelve-month period following *Beck* in an interest bearing escrow account." *Id.* And, if the plaintiffs invoke arbitration, "[t]hese monies will not be used by the Union until an independent arbitrator has reviewed the Union's percentage determination." *Id.*

ARGUMENT

The petitioners argue that the courts below erred in two respects: first, by holding that constitutional challenges to the negotiation or administration of a union security clause in a collective bargaining agreement between a private company and a private labor organization governed by the National Labor Relations Act "fail for a want of government action," Pet. App. 6a; and second, by holding that the procedure covering objections to the payment of agency fees adopted by the UAW in response to this Court's decision in *Beck* in fact meets the three criteria governing their fair representation claim asserted by the petitioners themselves, Pet. 17-18.

The first of these rulings—which faithfully follows the state action law stated by this Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)—is plainly correct. The second ruling is equally correct, and, moreover, represents the resolution of the kind of fact-specific controversy that is the domain of the lower federal courts. The *certiorari* petition should therefore be denied.

1 (a). In ruling on the petitioners' First Amendment claim, the courts below applied the two part state action test set out in *Lugar v. Edmondson Oil Co., supra*, 457 U.S. at 937. Pet. App. 6a-7a & n. 3, 19a-21a & ns. 6-7;

795 F.2d at 1130-33. The court of appeals described the *Lugar* test as follows:

> [S]tate action requires that: (1) the deprivation must be caused by the exercise of some right or privilege created by the state; and (2) the party charged with the deprivation must be a state actor. [Pet. App. 6a n. 3.]

The petitioner's First Amendment claims fail the first prong of this test, because, as the court of appeals explained in its first opinion, "[b]y authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA." 795 F.2d at 1133. And their constitutional claims fail the second prong as well, since "neither the employer nor the union here can be said to be a state actor." *Id.*[1]

(b) The *certiorari* petition cannot—and, indeed, does not even attempt to—take issue with either the invocation or the application of *Lugar*'s two-part test by the courts below. As this Court has recently reaffirmed, *Lugar* sets forth the basic "framework for state action analysis. . . ." *Edmondson v. Leesville Concrete Co.*, —— U.S. ——, 59 L.W. 4574, 4576 (June 3, 1991). Instead, the petitioners argue that this general "framework for state action analysis" is made irrelevant to the decision

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[1] The court of appeals summarized its state action analysis as follows:

> Thus, in enacting the NLRA congress mapped out the background and parameters of possible private action, but required nothing with respect to the particular wrong complained of here. When a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated. Since the union security clause was a product of private negotiations and was not attributable to the government, [petitioners'] constitutional challenges were properly dismissed for lack of government action. [795 F.2d at 1133 (citation omitted).]

of the instant case by *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956). Pet. 12-15. The petitioners are clearly wrong on this score; *Hanson*'s rationale makes it plain that its state action holding has no application to cases arising under the *National Labor Relations Act*.

In *Hanson*, state action was found in the Congress's "enactment" of the *Railway Labor Act* amendments authorizing union shop agreements on the railroads even in the face of contrary state law. 352 U.S. at 232. As the opinions below explain, "the finding of state action under Section 2, Eleventh of the RLA rests squarely on the fact that the RLA expressly preempts contrary state law;" the "NLRA, in contrast, contains no similar preemption of state law." Pet. App. 6a-7a, citing 795 F.2d at 1133. Indeed, "the NLRA expressly allows for contrary state law, see 29 U.S.C. § 164(b), and, therefore, does not authorize or provide for the deprivation of any right or privilege created by the government." Pet. App. 20a-21a n. 7.

The interpretation of *Hanson* by the courts below tracks this Court's explanation of *Hanson*'s state action ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977):

> Unlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present. . . ." [*Id.* at 218 n. 12.]

See also Communications Workers v. Beck, *supra*, 487 U.S. at 761.[2]

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[2] The petitioners' understanding of *Hanson*, as resting on the union's status as exclusive bargaining representative, Pet. 15, would place *Hanson* squarely in conflict with *Steelworkers v. Weber*, 443

(c) The petitioners cite two court of appeals cases as conflicting with the Second Circuit's state action ruling—*Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970), and *Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir. 1971). Pet. 16. But *Seay* and *Linscott* were decided prior to *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), which is the fount of this Court's current state action doctrine. And the other post-1974 court of appeals decision considering the state action question presented here in light of *Jackson* and *Lugar*, comes to the same conclusion as that reached by the Second Circuit, *viz.*, that under this Court's current framework for state action analysis private unions and private companies governed by the NLRA that negotiate union security agreements are not state actors. *See Kolinske v. Lubbers*, 412 F.2d 471, 474-480 (D.C. Cir. 1983).[3] Thus, there is no conflict with respect to the application of *Jackson* and *Lugar* to the state action question decided by the courts below.[4]

U.S. 193, 200 (1979). As the *Beck* opinion explains, *Weber* holds that the "negotiation of [a] collective bargaining agreement's affirmative-action plan does not involve state action." 487 U.S. at 761. In negotiating such a plan, the union acts "as the employee's exclusive representative," and thus, on petitioners' theory, both the collectively bargained plan and the union's administration of it would involve state action. Indeed, under the plaintiffs' state action theory every term of the collective bargaining agreement and every grievance resolution would be subject to constitutional scrutiny. *See also Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982).

[3] While *Kolinske* was decided before this Court's decision in *Beck*, constitutional claims identical to those raised by the petitioners in this case have been dismissed on state action grounds in the District of Columbia Circuit after *Beck*. *See Abrams v. Communications Workers*, 702 F. Supp. 920, 921-923, 925-926 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, 110 S.Ct. 540 (1989); *Fitz v. Communications Workers*, 132 LRRM 2186, 2188 (D D.C. 1989), *aff'd mem.*, 917 F.2d 62 (1990), *cert. denied*, 111 S. Ct. 1582 (1991).

[4] As Judge Tamm explained in *Kolinske*, in *Hovan v. Carpenters*, 704 F.2d 641, 645 (1st Cir. 1983), the First Circuit has backed

2. After stripping the petitioners' complaint of its constitutional veneer, the courts below found that in implementing its post-*Beck* objection procedures, "the Union has not acted arbitrarily, discriminatorily or in bad faith," and on that basis concluded that the complaints' remaining fair representation claims lack merit. Pet. App. 22a. *See also* Pet. App. 8.

Beck holds that nonmembers required to pay agency fees as a condition of employment may state a claim against their union representative with respect to the union's handling of the nonmembers' objection to the uses and amount of their agency fee payments. *Communications Workers v. Beck, supra*, 466 U.S. at 743. "Under [the fair representation] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Ass'n v. O'Neill*, —— U.S. ——, 111 S.Ct. 1127, 1134-35 (1991), quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Applying the teachings of the *Beck* opinion, the *O'Neill* Court held that this standard covers *all* fair representation claims:

> [W]e have . . . noted that the *Vaca v. Sipes* standard applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Communications Workers v. Beck*, 487 U.S. 735, 743 (1988) (internal citation omitted). [111 S.Ct. at 1135 (citations omitted).]

As *O'Neill* demonstrates, the courts below were entirely correct to apply the *Vaca v. Sipes* standard in evaluating

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away from the state action analysis in *Linscott*, and the Ninth Circuit opinion in *Seay* offered no analysis of the state action question at all, simply assuming that *Hanson* was controlling. *Kolinske v. Lubbers, supra*, 471 F.2d at 480-481 n.9.

the petitioners' fair representation claim. Pet. App. 8a, 22a. And it is equally plain that the courts' application of the *Vaca v. Sipes* standard to the facts here is beyond criticism.

The petitioners maintain that the duty of fair representation requires that any union objection procedure meet three specific criteria. Pet. 17-18. First, the procedure may not be "a 'rebate scheme' under which the union was 'exacting and using full dues then refunding months later the portion that it was not allowed to exact in the first place.' ". Pet. 17 quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 443-444 (1984). Second, the procedure must " 'inform the employee of his rights and obligations' under a union-shop clause," and must provide fee payers with " 'sufficient information to gauge the propriety of the union's fee' so that they may decide whether to object or not." Pet. 17 quoting *Electrical Workers Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962), and Pet. 18 quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986). Third, the procedure must " 'provide for a reasonably prompt decision by an impartial decision-maker' " of any objector's challenge to the amount his fee. Pet. 18 quoting *Hudson*, 475 U.S. at 307-308.

As the courts below found, the UAW's objection procedure meets all three of the criteria that the petitioners claim must be met under the duty of fair representation. Pet. App. 8a-11a, 22a-24a.

a. With respect to the petitioners' first criteria, the UAW's objection procedure is *not* a "rebate scheme." Pet. 17. The district court's findings—affirmed by the court of appeals, Pet. App. 8a—are dispositive of this issue:

> To the contrary, the Union has determined, at least preliminarily, the percentage of costs attributable to collective bargaining activities (85.4%) and adjusted plaintiffs' assessed fees accordingly. The Union has

> also placed a sum representing the entire projected 85.4% reduced payments of all non-Union plaintiffs for the twelve-month period following *Beck* in an interest bearing escrow account. These monies will not be used by the Union until an independent arbitrator has reviewed the Union's percentage determination. [Pet. App. 22a.]

b. With respect to the petitioners' second criteria, the Union's notice appended to the district court's opinion, Pet. App. 29a-33a, does " 'inform the employee of his rights and obligation' under a union-shop clause," Pet. 17. Further, the findings of the courts below, Pet. App. 8a-9a & 23a, establish that the Union did provide employees with sufficient information "so that they may decide whether to object or not," Pet. 18.

The UAW procedure provides all fee payers with notice that they have the option of objecting and paying a reduced fee based on the Union's collective bargaining expenditures. Pet. App. 21a-22a & 29a-30a. In addition, "each year, after a year-end audit, the Union will issue a Report of Expenditures Incurred in Providing Collective Bargaining Related Services (the 'Report') which will set forth the percentage of funds spent for chargeable and nonchargeable activities, as well as the major categories of expenditures and whether the Union denominates them as chargeable or non-chargeable to collective bargaining activities [, and] [t]his report will then be mailed to each nonmember who has filed an objection. . . ." Pet. App. 8a. *See also id.* at 23a.

The district court specifically found "the Report adequate for purposes of providing potential objectors an informed basis on which to object." Pet App. 25a. That finding is so well-grounded in the facts and law that on appeal the petitioners abandoned their contention that "the Union's annual expenditure Report is not sufficiently detailed to provide for an informed objection." Pet. App. 9a n. 5. Even so, the court of appeals endorsed the dis-

trict court's finding that the Report contained sufficient information. *Id.*

c. With respect to the petitioners' third criteria, every circuit to have ruled on the issue has held that the appointment of a fee arbitrator by the American Arbitration Association satisfies the First Amendment's requirement for an "impartial decisionmaker" in fee disputes. *See Ping v. Nat'l Education Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989) (citing authority from other circuits). If this appointment process satisfies the First Amendment's strict standards, it necessarily falls within the "wide range of reasonableness" allowed by the duty of fair representation. *See Air Line Pilots Ass'n v. O'Neill*, *supra*, 111 S.Ct. at 1130.[5]

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[5] Misquoting the court of appeals, the petitioners assert, "The record here contains evidence demonstrating, as the court of appeals conceded, 'an appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that respondent UAW's lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in' labor relations." Pet. 26. What the court of appeals in fact said is the following: "Moreover, in *Andrews* we held that even where constitutional concerns were present, the mere appearance of bias arising out of the fact that union officials sat on the AAA board of directors, that union lawyers were involved in the drafting of the AAA agency fee arbitration rules, and that the list of possible arbitrators had been limited by the union's agreement with the AAA to arbitrators who are experienced in 'public-sector labor relations,' was not sufficient to render these procedures constitutionally suspect. *Andrews*, 829 F.2d at 341." Pet. App. 11a.

To make matters worse, the "record evidence" relied upon by the petitioners is from the record in *Andrews*, not from this case. In the summary judgment phase of the district court proceedings, the petitioners made an entirely abstract argument with respect to AAA's neutrality. Dist. Ct. Dk. Nr. 77. Eight months after the district court rendered the summary judgment decision at issue here, Dist. Ct. Dk. Nr. 82, the petitioners attempted to incorporate portions of the *Andrews* record in the record in this case, Dist. Ct. Dk. Nr. 95. As the *Andrews* court correctly held, even the evidence submitted in *that case* did not impeach AAA's neutrality. *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335, 340-341 (2d Cir. 1987).

(d) Wholly apart from their three specific fair representation criteria, the petitioners contend that the Report reflects an inadequate fee calculation. Pet. 21-25. *See also* Pet. App. 9a. The petitioners raise two points in this regard: first, that the fee reduction is based on International Union expenditures, Pet. 21-22; and second, that, while the International Union expenditures are audited by a certified public accountant, the accountant does not further audit the allocation of these expenditures into the chargeable and nonchargeable categories, Pet. 22-25.

In support of these objections, petitioners rely entirely on public sector cases, which hold that, "because First Amendment rights are implicated, the method of calculating service fees for objecting employees adopted by the union must be narrowly drawn so as to minimize both the impingement upon the objectors' constitutional rights and the burden upon the exercise of those rights." *Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987) (internal brackets, quotation marks and citations omitted). The petitioners agree that a strict standard should be applied to the method by which the Union sets the initial fee reduction, because "precision of regulation must be the touchstone in the First Amendment context." Pet. 22 (internal bracket, emphasis, quotation marks and citations omitted). As their basis for applying this First Amendment principle under the statutory duty of fair representation, the petitioners flatly assert, "[t]hat same precision is required by the duty of fair representation, ..." Pet. 22.[6]

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[6] The court of appeals noted that the UAW's method of allocating expenditures based on the audit of the Union's financial statements meets even the First Amendment standards applicable in the public sector as set out in *Andrews v. Cheshire Education Ass'n*, 829 F.2d 335 (2d Cir. 1987). Pet. App. 9a-10a. Other Circuits have followed *Andrews* in this regard. *See Dashiell v. Montgomery County, MD*, 925 F.2d 750, 754-755 (4th Cir. 1991) (discussing the circuit court precedents). In addition, citing with approval the trial court opinion

But this Court's precedents establish in no uncertain terms that the statutory duty of a private sector labor organization to fairly represent the employees in its bargaining unit is *not* equivalent to the government's First Amendment duty to avoid infringing freedom of speech. The duty of fair representation allows unions a "wide range of reasonableness." *Air Line Pilots Ass'n v. O'Neill*, *supra*, 111 S.Ct. at 1130, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). As the Court explained in *Steelworkers v. Sadlowski*, *supra*, a statutory requirement that union actions be "reasonable" is not equivalent to "the stringent tests applied in the First Amendment context." 457 U.S. at 111. Against this background, the courts below clearly applied the correct standard in reviewing the Union's initial fee reduction.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted

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in *Andrews*, the court of appeals found that the UAW's use of International Union expenditures to calculate the initial fee reduction was reasonable, because if a fee payer challenged the calculation, "the Union bears the burden of proving that the local union's expenditures are chargeable to the degree asserted by the Union." Pet. App. 10a.

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Petitioners,

v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 90-1855

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT PRICE, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION,LOCAL 571, UAW, AFL-CIO,

Respondents.

REPLY TO BRIEF IN OPPOSITION

The opposing brief notably abandons any disagreement with petitioners' argument and assertion that there exists an explicit conflict among the circuits between the decision below in *Price* and the Sixth Circuit's decision against the Auto Workers in *Cramer v. Matish*, Pet. 11a, as well as with the First Circuit in *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1981), and the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970). Maintenance of a uniform judicial agency fee standard for the benefit of workers and unions under federal labor policy must be preferred over the development of a dual system of judicial standards countenanced by the court below for workers under the

Railway Labor Act ("RLA") and those workers laboring under the National Labor Relations Act ("NLRA" or "Act").

I. DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WILL LEGITIMIZE DISREGARD FOR THE COURT'S RULINGS IN *BECK*

As set out in the Petition, this case presents two alternative considerations. First, whether the union security provisions of the RLA and NLRA should be treated identically when "in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending 'to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act.' 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown)." *Communication Workers v. Beck*, 487 U.S. 735, 746 (1988). If this proposition is not true, then the NLRA governmental action question left open in *Beck*, 487 U.S. at 761-62, must be addressed to confront the "serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable," which the court below chose to do.

The court of appeals below concluded that because this Court "expressly declined to rule on the state action issue" in *Beck*, Pet. App. 6a, *Beck* "does not in any way modify this Court's prior determination that the union shop agreement" results from private action "not attributable to the government," because the NLRA lacks the express statutory language of preemption as does the RLA.[1] Pet. App. 6a. Resolution of the petitioners' First Amendment challenge by the court below now requires this Court to address whether the enactment of the union security provision of the NLRA in § 8(a)(3) infuses "governmental action" into NLRA collective bargaining agreements, even when

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[1]That opinion was vacated by this Court in light of *Beck*, *Price v. International Union, UAW*, 487 U.S. 1229 (1988), *vacating*, 795 F.2d 1128 (2d Cir. 1986).

this Court has found the statutory language in both laws "nearly identical...regardless of whether the negotiation of union security agreements under the NLRA partakes of governmental action." *Beck*, 487 U.S. at 762.

The respondents agree with the court of appeal's proposition that the Congress' authorization of the union shop clause in § 8(a)(3) did not add to any powers private parties already had and could have necessarily agreed to before the Act, including the proposition that money could be taken out of the paychecks of protesting workers for political purposes. *See* Opp. at 5. Relying upon the Court's test in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), they suggest petitioners have not demonstrated the framework for state action in the NLRA through a passing reference to *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (peremptory racial challenges unconstitutional).

There, this Court acknowledged that a deprivation caused by a right or privilege created by the state includes, "[l]egislative authorizations, as well as limitations." Thus, but for the enactment of § 8(a)(3), "[i]t cannot be disputed that without the overt, significant participation of the government, the peremptory challenge system [union security], as well as the jury trial system [collective bargaining system] of which it is a part, simply could not exist." *Id.* at 2084. "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity *subordinates* the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182, 186 (1967) (emphasis added).

But the framework of state action suggested by the petitioners (and not contradicted in the opposing brief) is based upon the infusion of authority granted to exclusive labor representatives by Congress in the Act. In *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198-202 (1956), the Court explained that the RLA necessarily encompassed a restriction on union power to discriminate because of Congress' creation of the power of exclusive representation ("a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a

legislature to give equal protection to the interests of those for whom it legislates"). *See Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1133 (1991) ("Our decisions have long recognized that the need for such examination [of private union agreements] proceeds directly from the union's status as exclusive bargaining agent.").

At common law, unions had no right to act as the exclusive representative for any employees but those that voluntarily chose to submit to representation. Prior to the Act, workers were free to join and free not to join or pay union dues.[2] Under the interposed labor principle of exclusive representation, individual worker contracts must yield to collective-bargaining agreements. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). Bargaining by individual workers is strictly prohibited and dissatisfied workers who circumvent their exclusive representatives are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 72 (1975) (picketing); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967) (union fines).

The respondents' belief that state action made a fundamental difference to this Court's decision in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and therefore "its state action holding has no application to cases arising under the *National Labor Relations Act*," is misplaced. Opp. at 6. The basis for their reading of *Hanson* is that section 14(b) of the Act, allows states to override union security provisions whereas the RLA does not contain such a provision. Maintenance of this distinction for purposes of § 8(a)(3) completely undermines the linkage

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[2]Since Connecticut has never implemented NLRA § 14(b), the federal statute is the action which establishes and empowers the private parties (employer and union) to require union security and authorizes fee collection by judicial action.

to statutory intent in both the NLRA and the RLA as explained in *Beck*.[3]

Statutory construction must place the burden upon unions to process agency fee plans under the RLA and the NLRA alike. This is the unmistakable intent of the Court in *Beck*, *see* Pet. at 11, where the Court not only believed that "[o]ur decision in *Street* however, is far more than merely instructive here: we believe it is *controlling*, for § 8(a)(3) and § 2, Eleventh are in all material respects identical," 487 U.S. at 745, but also stated "we think that Congress intended the same language to have the same meaning in both statutes." *Id.* at 746-47 (emphasis added). *See* Pet. at 14.

As showed in the Petition at 15-16, the First and Ninth Circuits in *Linscott v. Miller Falls Co.* and *Seay v. McDonnell Douglas Corp.*, respectively, have found the NLRA infused with state action and otherwise have followed the Court's agency fee rulings in *Hanson* and *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), as guidance in interpreting section 8(a)(3) of the Act to avoid the constitutional challenge of the NLRA. The respondents' vigorous attempt to discredit these two obvious circuit conflicts due to the intervening decision in *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), and based on *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), is diminished in light of

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[3]Respondents' suggest that if exclusive representation is the key to state action in *Hanson*, it would jeopardize the holdings in *Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982). However, neither case applied state action to the NLRA. Weber never raised the constitutional question in his case. *See* Petitioner's Brief at 46, 12 *BNA Law Reprints* No. 13 (1978/79 Term) ("This case arises under Title VII. No claim for relief based on the constitution is presented."). *Sadlowski* involved an internal union matter between voluntary union members under the Landrum-Griffin Act, not the NLRA.

the Court's more recent decision in *Beck*, which supports the analysis of the First and Ninth Circuits.[4]

Clearly, the Court's most recent guidance upon which a union would charge agency fees forcefully applies equally in the public and private employment sectors. In *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991), every member of the Court agreed that its rulings in *Hanson*, *Street*, and *Railway Clerks v. Allen*, 373 U.S. 113 (1963) "are cases of statutory construction," 111 S. Ct. at 1957 (Blackmun, J); 111 S. Ct. at 1967 (Marshall, J) (joining in Part I of Justice Blackmun's opinion), not constitutional adjudications. Justice Scalia's concurring opinion agrees that "*Street, Ellis [v. Railway Clerks,*, 466 U.S. 435 (1984)] and *Beck*, were statutory cases." 111 S. Ct. at 1978. If this is so, then the court of appeals was incorrect in finding RLA agency fee standards to be based upon the constitution rather than upon the statute itself and concomitantly failed to equally apply the same protections to the petitioners.

The court of appeal's decision to treat the *statutory* duty of unions under the NLRA and the RLA differently is inconsistent

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[4]Neither the First nor Ninth Circuits have chosen to withdraw their opinions in light of *Beck* or other precedent of this Court. Contrary to the respondents' statement that Judge Tamm in *Kolinske v. Lubbers*, 712 F.2d 471, 480-81 n.9 (D.C. Cir. 1983), suggested the First Circuit "has backed away from the state action analysis in *Linscott*," Opp. at 7 n.9, Judge Tamm stated nothing of the sort. Rather he pointed out that the D.C. Circuit's opinion finding no state action was expressly contrary to the "two other circuits which have faced this issue have reached an opposite result." *Id.* Further Judge Tamm's reference to the result in *Hovan v. United Bhd. of Carpenters & Joiners*, 704 F.2d 641, 645 (1st Cir. 1983), was to note that there a union loyalty oath was held to be outside constitutional review. The First Circuit in Hovan specifically found no state action in the union's oath since Hovan had no "private right...'being invaded' by 'force of' any 'agreement.'" 704 F.2d at 643 *quoting Hanson*. Furthermore, the First Circuit determined "we need not call *Linscott* into question to conclude that no governmental action is present here," *id.*, thereby reaffirming that a union security agreement does invade an individual's private right and partakes of government action, whereas entry qualification for union membership does not.

with this Court's decisions, raises substantial questions for millions of workers, and requires exercise of supervisory action by this Court to correct the error before further circuit conflicts arise.

II. WHETHER THE UNIONS' REBATE PROCEDURE THAT ADMITTEDLY FAILS TO PROVIDE THE SAME PROCEDURAL PROTECTION TO NON-MEMBERS AS THAT REQUIRED UNDER THE RLA, IS ADEQUATE TO MEET THE DUTY OF FAIR REPRESENTATION UNDER THE NLRA, RAISES ISSUES OF LAW THAT REQUIRE THIS COURT'S ATTENTION

Petitioner seeks review of three substantial legal questions yet to be resolved by this Court. First, whether the respondents can deny the release of information to workers concerning chargeable expenditures of its local union under a euphemistic "local presumption" that the international union expends a greater percentage of money on non-germane activities than does its local affiliate. Second, whether it is sufficient for a union to take an audited financial statement and extract from the auditor's report data as to what shall be deemed chargeable to non-members without the auditor verifying that money in the categories established by the union for chargeability were expended, and therefore are chargeable to the non-members for those purposes. Third, whether *mutual* selection of an arbitrator by *both* the nonmembers and the unions is a necessary element of the selection of an impartial *decisionmaker*.[5]

The respondents' opposition demonstrates that labor organizations have little interest in treating non-union workers equally in the interest of fairness and that equality of treatment is not inherent in the unions' view of their duty of fair representation. This should surprise the Court and would come as a surprise to the Congress as well. Because equality of treatment

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[5]These propositions are not fact specific as respondents contend. Opp. at 4. They involve principles universally applicable to union agency-shop procedures.

is precisely the interest at stake in this case under the duty of fair representation, in fairness, the respondents should not be able to treat their non-members disparately, *i.e.*, providing non-members working in the Sixth Circuit in *Cramer v. Matish*, Pet. App. 47a, *with* information concerning local expenses and *denying* the instant respondents access to the same information based upon the very same discredited "local presumption." The respondents' opposition fails to address their disparity of treatment and the conflict with *Cramer*.

a. The court of appeals called the respondents' post-*Beck* agency fee payer plan "a rebate plan." 5a. The union asserts it is not a rebate plan despite the court of appeal's characterization because, although the unions have taken 85.4% of petitioners money without first having established that any of that amount is chargeable at all by an independent audit, they placed the money in escrow pending review. This process makes it a rebate plan despite later decisionmaker review of the unions' records.

What respondents submitted to petitioners was an $830 million audited financial report of 86 pages of single-line financial data, C.J.A. 193-279, plus a sixteen page *unaudited* summary of charges to non-members, C.J.A. 280-295. Moreover, the respondents' summary expenditure Report reports the allocation of broad categories of audited expenses of solely the *international union* said by it to be chargeable and non-chargeable to the non-member petitioners. Disclosure to petitioners of any of this respondent *local union's* chargeable expenses is expressly refused contrary to the Sixth Circuit's direction to the International in *Cramer*.

b. The Auto Workers union must presently provide an *audited* informational summary to non-members based upon the Sixth Circuit's decision in *Cramer v. Matish*, *see* Wellford, J., 55a-58a, as well as local affiliate disclosure to them to satisfy their *Hudson* obligations. The Sixth Circuit in *Tierney v. City of Toledo*, 917 F.2d 927, 936 (6th Cir. 1990), presently imposes the requirement that the auditor also verify that chargeable expenses determined by the unions were actually expended by them: "Disclosure of the

major categories of expenses and the methodology of the agency fee calculations means very little if the non-members cannot have some level of confidence in the verification of expenditures." Petitioners agree. *See* Pet. 23-24.[6] The Second Circuit's disagreement on this point with the Sixth Circuit further raises the question of fairness in the treatment of nonmembers. Pet. App. 10a; *Andrews v. Education Ass'n*, 829 F.2d 335 (2d Cir. 1987).

c. Finally, respondents do not dispute that consensual arbitration is the hallmark of impartial decisionmaking accepted in all private disputes including labor matters. Pet. 26. They do not dispute that the "arbitration" procedure and rules unilaterally developed for use against the petitioners is unique in American experience and might suggest the appearance of bias. Yet, they would claim the propriety of this process is satisfactory under the duty of fair representation as falling "within the 'wide range of reasonableness'" explained in *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1130 (1991), Opp. at 11, when the Court actually stated that "a union's actions are arbitrary only if, *in light of the factual and legal landscape at the time of the union's actions*, the union's behavior is so far outside a 'wide range of reasonableness..., as to be irrational.'" *Id.* (citation omitted). The respondents' exhortation that RLA and public sector agency fee procedures should not apply to NLRA workers is admittedly contrary to all judicial precedent on this issue (*Hanson*, *Ellis*, and *Beck*) and should be rejected by this Court at this time.[7]

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[6]The respondents have not disagreed that *Cramer* is *res judicata* against the international union. *See* Pet. 22 n.15.

[7]The respondent's attempt to suggest that the statement of the court of appeals that "the mere appearance of bias...was not sufficient to render these procedures constitutionally suspect," Pet. 11a, does not mean what it says, is erroneous. Either the court of appeals was admitting that AAA bias exists in the union developed procedure or it concluded there can readily be said to exist the appearance of AAA bias in union fee litigation, but that the court found this was not sufficient to invalidate the arbitration of agency fee matters under the duty of fair representation. As established in the Petition at 26, this Court has always required that arbitration be consensual and must avoid the appearance of bias.

CONCLUSION

This case presents two critical issues left open in *Beck* concerning whether the same protections apply to workers under the NLRA as are applied under the RLA. The conflict of procedural law in the Sixth and Second Circuits dealing with the same union highlights the need for this Court's review.[8]

For these reasons, petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: September 6, 1991

Petitioners submit that neither is true here.

[8]The respondents have not objected to petitioners' suggestion that the statutory construction question, that RLA and NLRA agency shops must be treated alike, might be addressed by an order of summary reversal. *See* Pet. 20 n.14.